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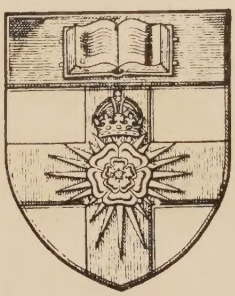

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THE

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Court of Exchequer.

REPORTED BY

JAMES ANSTIE, ARTHUR CHARLES, ARTHUR P. STONE,
AND JAMES M. MOORSOM,

BARRISTERS-AT-LAW.

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OF

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CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXVIII VICTORIA.

Followed. PAYNE *v.* RAILWAY EXECUTIVE [1952] 1 K.B. 26

BRADBURN *v.* THE GREAT WESTERN RAILWAY COMPANY.

1874
Nov. 6.

Negligence—Railway Company—Insurance—Damages.

In an action for injuries caused by defendants' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages.

ACTION brought to recover damages for injuries sustained by the plaintiff through the defendants' negligence, while he was travelling as a passenger on their line. The cause was tried at Stafford, before Pigott, B., at the last Summer Assizes. The jury found a verdict for the plaintiff for 217*l.*; but, as it appeared that he had received a sum of 31*l.* on account of the accident upon an insurance effected by him with the Accidental Insurance Company, it was contended by the defendants that that sum ought to be deducted from the sum at which the jury assessed the damages. The learned judge, after consulting with Lord Coleridge, C.J., directed the verdict to be entered for the whole sum, but reserved leave to the defendants to move to reduce the verdict by 31*l.*

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Huddleston, Q.C., moved accordingly. The plaintiff's loss from the accident was partly compensated by what he received from the insurance company by reason of the accident. The case of *Yates* v. *Whyte* (1) is distinguishable on the ground that the policy there was strictly a contract of indemnity, and the plaintiff was to hold the proceeds of the action in trust for the underwriters so far as they had indemnified him. (2) The direction of Lord Campbell, C.J., to the jury in *Hicks* v. *Newport, &c., Ry. Co.* (3), in an action brought under 9 & 10 Vict. c. 93, is more applicable; there the whole sum received on an accident policy was deducted.

BRAMWELL, B. Clearly there must be no rule. The jury have found that the plaintiff has sustained damages through the defendants' negligence to the amount of 217*l.*, but it is said that because the plaintiff has received 31*l.* from the office in which he insured himself against accidents, therefore the damages do not amount to 217*l.* One is dismayed at this proposition. In *Dalby* v. *India and London Life Assurance Company* (4) it was decided that one who pays premiums for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shews that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendants' negligence.

As to the case of *Hicks* v. *Newport, &c., Ry. Co.*, that was an action brought under Lord Campbell's Act, and the ruling is quite correct. The statute had laid down no rule as to the mode of

(1) 4 Bing. N. C. 272.

(2) In *Yates* v. *Whyte* (4 Bing. N. C. at p. 285), Bosanquet, J., after referring to the similar case of *Mason* v. *Sainsbury* (3 Doug. 60), says, "There the action was brought for the benefit of the underwriters; here the plaintiff sues on his own account. But I think that makes no difference; for he has the legal right to the damages, and if the underwriters have an equitable right, they will establish it in another court."

(3) 4 B. & S. 403, note to *Pym* v. *Great Northern Ry. Co.*

(4) 15 C. B. 365; 24 L. J. (C.P.) 2.

18 Jan 1874

calculating the damages to be given in respect of the right of action which it created. The rule was first laid down in this court (1), and that rule was, that the damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and similarly, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account. But that has no bearing on the case of a person suing upon his common law right for injuries caused to him by the defendants' negligence.

PIGOTT, B. I am of the same opinion. The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.

AMPHLETT, B., concurred.

Rule refused.

Attorneys for defendants: *Young, Maples, & Co.*

(1) *Franklin* v. *South Eastern Ry. Co.* 3 H. & N. 211, followed in *Dalton* v. *South Eastern Ry. Co.* 4 C. B. (N.S.) 296; 27 L. J. (C.P.) 227, and *Pym* v. *Great Northern Ry. Co.* 4 B. & S. 396; 32 L. J. (Q.B.) 377.

1874
Nov. 14.

NIELD AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

The defendants, owners of a canal, being threatened by an overflow of flood water from a neighbouring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises, which were also situated on the banks of the canal above the premises of the defendants, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiffs' premises. In an action brought to recover damages for the injury so caused:—

Held, that the defendants were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it.

ACTION to recover damages for injury caused to the plaintiffs' premises through water which was, as the plaintiffs alleged, thrown upon them through the act of the defendants in placing a barricade across their canal, by the side of which the plaintiffs' premises were situated.

At the trial of the cause before Brett, J., at the Manchester summer assizes, 1873, the learned judge non-suited the plaintiffs upon the opening of Counsel, reserving leave to the plaintiffs to move to enter a verdict for them (the damages to be assessed by an arbitrator) if on an agreed statement of facts the Court should be of opinion that they were entitled to maintain the action.

The following statement of facts was subsequently agreed upon:—

1. The plaintiffs are the occupiers of land, and of a cotton mill built thereon in the year 1856.

2. The defendants are the owners of, and have the control and management of, the Huddersfield Canal, which extends from Huddersfield to Ashton-under-Lyne, and there forms a junction with another canal extending to Manchester.

3. The Huddersfield Canal was constructed pursuant to an Act of Parliament passed in 1794. (1)

(1) No reference was made on the argument to the provisions of this Act.

4. The river Tame, which rises in the Saddleworth hills, is at a distance of about seventy yards from the canal at the point, nearly opposite to the plaintiffs' premises, where the water flowing from the river made its way into the canal as mentioned below.

5. The canal is not supplied with water from the river, and does not communicate with it in any way whatever.

6. On the 13th of July, 1872, there was an extraordinary rainfall, and the water of the Tame began rapidly to rise, overflowing its banks and flooding the adjacent fields.

7. The water in the canal stood, previous to the flood, at or about its ordinary level, that is to say, about nine or ten inches below the coping stone of the towing path on both sides of the canal.

8. As the flood from the river continued to increase, the manager of the canal became apprehensive that the water from the river might enter the canal and injure the defendants' warehouses and premises situated on its banks.

9. At a point in the canal above the defendants' warehouses, but below the premises of the plaintiffs, there were grooves cut perpendicularly from the coping stone to the bottom of the canal on either side, and, pursuant to the manager's orders, planks were put edgeways in these grooves from the coping stone to the bottom of the canal. The top plank reached to the top of the coping stone, which is some distance above the ordinary level of the water in the canal.

10. The overflow of water from the river still continued to increase, until it flowed over and finally through the canal fence and bank, and, crossing the towing-path, found its way into the canal. The water in the canal shortly afterwards rose to a point higher than the planks, and flowed over them in the direction of the defendants' warehouses.

11. The water in the canal afterwards rose still higher, and flooded the plaintiffs' mill through openings therein, doing the damage complained of.

12. It is to be taken as a fact, for the purpose of the argument only, that the insertion of the planks, by banking up the water, caused it to rise higher in the plaintiffs' premises than it other-

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wise would have done, and thereby occasioned them substantial damage.

A rule having been obtained,

Holker, S.G., and *Edwards, Q.C.*, for the defendants, appeared to shew cause; but the Court called on

Herschell, Q.C., *Baylis*, and *A. Dicey*, to support the rule. If this had been a natural watercourse there can be no doubt that the defendants could not have closed it; water that has once come into a watercourse by natural causes must be allowed to escape by the natural channel. And the rule is the same with respect to a canal; assuming the owners were not bound to receive the water, and might have kept it out of the canal without being liable to any one, yet having admitted it, they were bound to let it flow down without obstruction. To that extent, at least, the plaintiffs, whose premises were situated by the side of the canal, were entitled to a benefit corresponding to the burden which the neighbourhood of the canal, legalised by statute, put them under. But, independently of this, the defendants are liable on the ground that they have thrown the water on the plaintiffs' premises. There is no authority that—except in the case of the sea, which is to such an extent a common enemy that the man who embanks against it may be said to be acting for the public: *Rex* v. *Pagham Commissioners* (1), and in the case where life or person is at stake—any person is entitled to avert from himself, so as to throw upon another, a threatened mischief arising from natural and physical causes. [They cited *Rex* v. *Trafford* (2); *Menzies* v. *Earl of Breadalbane* (3); *Bickett* v. *Morris*. (4)]

BRAMWELL, B. This rule must be discharged, on the ground that, except in defending themselves against the water, the defendants had nothing to do with bringing the water to the place where it did the injury complained of. If, instead of a canal, there had been a railway or a carriage road, the mischief would have been the same; and I can see nothing in the argument that the plaintiffs were entitled to the benefit of the canal being there,

(1) 8 B. & C. 355.
(2) 1 B. & Ad. 874; 8 Bing. 204.
(3) 3 Bli. (N.S.) 414.
(4) Law Rep. 1 H. L. Sc. 47.

for the only benefit they were entitled to was that which corresponded with the servitude, that is, the right not to be injured by the defendants bringing water there without giving it a sufficient means of escape. Thus, if a feeder which ordinarily lets in so many gallons of water, should, in consequence of a violent flood, let in ten times as much, the defendants must provide for its escape, for they have brought the water there. Here, however, they have in no sense brought the water there.

But it has been argued that the defendants had no right to defend themselves against the flood. That is an argument which I cannot understand; the flood is a common enemy against which every man has a right to defend himself. And it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed out of fear lest some neighbour might say "You have caused me an injury." The law allows what I may term a kind of reasonable selfishness in such matters; it says, "Let every one look out for himself and protect his own interest," and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, "Why did not you do the same?" I think what is said in *Menzies* v. *Earl of Breadalbane* (1) is an authority for this, and the rule so laid down is quite consistent with what one would understand to be the natural rule. Where, indeed, there is a natural outlet for natural water, no one has a right for his own purposes to diminish it, and if he does so he is, with some qualification perhaps, liable to any one who is injured by his act, no matter where the water which does the mischief came into the watercourse. I say with some qualification, because it may be that, even in the case of a natural watercourse, the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water. But it is not necessary to go further into that question, for here there was no right to an outlet for water. It might be a question whether the defendants could lawfully fill up the canal, which is a public highway; but setting that aside, which is not a matter the plaintiffs could complain of by action, could they have complained if, instead of a barricade, the defendants had put up a wall? No;

(1) 3 Bli. (N.S.) 414.

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and the only difference is, that that would be a permanent obstacle and this is a temporary one.

Therefore, on the ground that the defendants in no sense brought the water, or caused it to come to the place where the damage happened, but that it came by natural causes, that is, by a heavy fall of rain, and the overflowing of the river, and the configuration of the country, the defendants had the right to protect themselves against it, and the plaintiffs cannot complain although what the defendants did in so protecting themselves augmented the damage to them.

PIGOTT, B. I am of the same opinion. I read the 8th paragraph as admitting that the apprehension under which the canal keeper acted was a reasonable apprehension of damage to the defendants' warehouses. Reading it in that sense, what the defendants did was no more than if they had placed boards against the windows of their warehouses. Instead of that they put the boards across the canal so as to prevent more water than the canal could hold from flowing down it. They have not interfered with any natural flow of water, nor with the stream of the river; they have only adopted precautions to defend their property against what may be described as the extraordinary casualty of a great flood breaking into the canal. I can see no authority which forbids a man from protecting his property in this way. In *Menzies v. Earl of Breadalbane* (1), the Lord-Chancellor, after quoting two passages from the Digest (lib. 39, tit. 3), and referring to other passages which he describes as appearing to have a contrary tendency, says of the latter passages, "Or consider the subject in this light, that those passages to which I am now alluding have reference to accidental and extraordinary casualties from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of such self-preservation, guard themselves against the consequences; perhaps in this way the different passages in the Digest may be reconciled." The Lord Chancellor in these words seems to adopt as a proper rule of law the principle that a man should be per-

(1) 3 Bli. (N.S.) 414, at p. 420.

mitted to protect himself in this way against sudden and extraordinary casualties. The defendants have done no more, and the plaintiffs cannot therefore maintain any action against them.

AMPHLETT, B. I am of the same opinion. I think the analogy between a canal and a natural stream is a false one. You cannot obstruct a natural stream, because the riparian proprietors above and below have a right to the use of the watercourse, and no one has a right to build across or upon the bed of the stream for any purpose. But this canal is not a natural outlet for water, nor had the plaintiffs any right to its use as such; and the plaintiffs cannot succeed, unless it can be shown that the canal, through what was done by the defendants, did bring a larger amount of water on to the plaintiffs' premises than would have gone there if the canal had never been made, or had been previously filled up. Therefore, in order to see whether the defendants are liable, we must look at all the acts done by them, beginning from the making of the canal and ending with the flood on the plaintiffs' premises. Did, then, the defendants bring more water than would naturally have come there, and was the outlet of the water obstructed by their acts? Now the canal was not in any way fed by the river, but the water of the river got into the canal, and if it had not got into the canal at all, exactly as much water from the river would by the natural configuration of the land have flowed down to the plaintiffs' premises. Therefore, on that part of the case, it appears that no more water came on to the plaintiffs' premises through the canal than would have come there otherwise. Then would the water have found an easier outlet if the defendants had never made the canal, and had never put the planks across it? I say, if they had never made the canal, because the plaintiffs cannot complain that they would have had a better outlet if the canal had been made, and the planks not put there. Now, so far from the canal penning or backing up the water, it provided an outlet more convenient than the natural outlet, even after the planks had been put across it; because, from the configuration of the ground, the water could not have flowed away so easily if the canal had not been cut there. Therefore I cannot see any damage for which the defendants are liable; and, without

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going into the cases as to the right to protect oneself against a common enemy, which is a point that does not really arise here, I think the rule must be discharged, on the ground that what was done by the defendants was not the cause of any mischief to the plaintiffs.

Rule discharged.

Attorneys for plaintiffs: *Phelps & Sidgwick, for Sale & Co., Manchester.*

Attorney for defendants: *R. F. Roberts.*

Nov. 12.

ELLIS AND OTHERS *v.* WILMOT.

Principal and Surety—Liquidation by Arrangement—Bankruptcy Act, 1869, *s.* 125—*Effect of absolute Discharge of principal Debtor.*

1 E. D. 159
1 Q.B.D. 589

Where a principal debtor is discharged by a resolution under s. 125 of the Bankruptcy Act, 1869, his surety remains liable in the same manner as in an ordinary bankruptcy, although the resolution contains no reservation of rights against sureties.

SPECIAL case stated without pleadings for the opinion of the Court on the following facts:—

Prior to October, 1869, Etheridge carried on business as a jeweller in Norwich, in partnership with the executors of Ellis. In that month a dissolution was agreed upon, one of the terms being that Etheridge should take to the business, and, amongst other things, give security for the payment of 7000*l.* to the executors. A joint and several bond was accordingly executed by Etheridge, and by the defendant and others as sureties, to pay 7000*l.* by fourteen half-yearly instalments of 500*l.* each. The defendant's liability, however, was limited to 1300*l.* Two instalments were paid in full by Etheridge before the 6th of April, 1871, when he filed a petition for liquidation under the Bankruptcy Act, 1869, s. 125. At a general meeting duly held under that section the requisite majority of his creditors resolved that his affairs should be liquidated by arrangement, and a trustee was appointed. Everything necessary to be done was done to make the proceedings binding upon all the creditors. In April, 1871, the plaintiffs

proved against the estate for 6020*l.* 11*s.*, which was the whole amount remaining due to them on the bond for principal and interest. The estate paid a dividend of 9*s.* 2*d.* in the pound, which the plaintiffs received upon the amount of their proof.

On the 5th of August, 1872, a resolution, to which the plaintiffs were parties, was duly passed by the statutory majority, granting the discharge of Etheridge; and this discharge was afterwards certified and reported to the registrar, who gave his certificate of the discharge in accordance with the provisions of the Bankruptcy Act, 1869, s. 125. The defendant was not an assenting party to the resolution, nor did he prove against the estate on account of his liability under the bond. The plaintiffs in this action, which was brought when five instalments were due, sought to recover from the defendant the amount due from him on the bond, but upon the argument they limited their claim to 405*l.* 11*s.*, the amount admitted to be due, if anything was due, at the date of of the writ, having regard to the fact that his liability was limited to 1300*l.*, and that the plaintiffs had received a dividend of 9*s.* 2*d.* in the pound from the principal debtor.

The question for the opinion of the Court was whether the plaintiffs were entitled to recover. (1)

Nov. 11. *Manisty, Q.C.* (*Petheram* with him), for the plaintiffs, cited *Browne* v. *Carr.* (2)

[He was stopped.]

Prentice, Q.C. (*Gould* with him), for the defendant. The debtor's discharge under s. 125 of the Bankruptcy Act, 1869, to which the plaintiffs were assenting parties, discharges the surety. Under s. 126, there is no doubt that this would be so: *Wilson* v. *Lloyd* (3); and the reasoning of that case applies here. Both under s. 125 and s. 126 the proceedings are the voluntary acts of the parties, and this distinguishes liquidation by arrangement and composition from an ordinary bankruptcy. In deeds of

(1) A question was also raised for the opinion of the Court as to the mode in which the amount, if any, recoverable by the plaintiff, was to be calculated, but it was not discussed, the plaintiffs being content in the present action to have judgment for 405*l.* 11*s.*, the minimum sum to which at the issue of the writ they were entitled, if entitled at all.

(2) 7 Bing. 508.

(3) Law Rep. 16 Eq. 60.

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arrangement under the Bankruptcy Act, 1861, a release of the debtor discharged the surety, unless rights against him were expressly reserved: *Bateson* v. *Gosling* (1); *Cragoe* v. *Jones* (2): and the principle of the decisions on the construction of those deeds is applicable to liquidation by arrangement, which is just as much a voluntary act as entering into a composition deed. The language of s. 125, subs. 10, is not decisive. It should be limited to the effect of the discharge upon the debtor himself. Again, the form of discharge under s. 125 (form 122) appears to indicate that it might, if the creditors pleased, be conditional, there being a blank space for the insertion of conditions. *Megrath* v. *Gray* (3) is no authority for the plaintiffs. That case did not in any way deal with the position of a surety, and only decided that a joint debtor was not released by the discharge of his co-debtor (see s. 50 of the Bankruptcy Act, 1869).

Manisty, Q.C., in reply.

Nov. 12. KELLY, C.B. I am of opinion that the plaintiffs are entitled to our judgment and to issue execution for 405*l.* 11*s.* The action was on a joint and several bond to pay 7000*l.* by fourteen half-yearly instalments of 500*l.* The defendant is one of the obligors, and executed the bond as a surety only and with a limitation of his liability to the extent of 1300*l.* At the time of action brought seven instalments had become due. Two had been paid in full, and therefore, were it not for the limitation I have referred to and to the proceedings on liquidation, the effect of which is the main question in the case, the defendant would be liable to pay 2500*l.* The plaintiffs, however, who have received a dividend of 9*s.* 2*d.* in the pound under the liquidation, limit their present demand to the sum of 405*l.* 11*s.*

Now, it is said by the defendant that the plaintiffs have lost their right to proceed against him by reason of their having consented to the principal debtor being discharged under a liquidation of his affairs by arrangement under the Bankruptcy Act, 1869, s. 125. But I think that although they were parties to the resolution discharging the principal, their remedy against the

(1) Law Rep. 7 C. P. 9.
(2) Law Rep. 8 Ex. 81.
(3) Law Rep. 9 C. P. 216.

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surety is unaffected, just as it would have been unaffected by the debtor's discharge in bankruptcy. In the latter case the surety would still remain liable upon the grounds mentioned in *Browne* v. *Carr* (1), a case which is of undisputed authority. But the defendant contends that a discharge under s. 125 is different from an ordinary discharge in bankruptcy, and relies upon various cases, and especially upon a recent case in this Court, where a discharge of a principal debtor under the terms of a composition deed has been held to discharge the surety also, remedies against him not being expressly reserved. I will refer to these cases and to the principle upon which they proceeded more in detail presently, but will first consider the question before us with reference to the provisions of the Bankruptcy Act itself. Section 125 enables the affairs of a debtor to be liquidated by arrangement. It provides that a meeting of creditors is to take place and resolutions to be passed. The debtor is to be present and to answer all questions put to him, and in fact to do all that a debtor would be bound to do in the case of an ordinary bankruptcy. His property is to be surrendered to a trustee for the benefit of his creditors, and is to be distributed in all respects as though there had been a bankruptcy. Then the 7th subsection enacts that "the trustee under a liquidation shall have the same powers and perform the same duties as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in bankruptcy, and all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs were under liquidation, and the word 'bankruptcy' included liquidation by arrangement." Then follows another subsection giving the creditors power to choose the bank into which the trustee is to pay monies, and afterwards by subs. 9 the mode in which the debtor is to be discharged is prescribed in these words: "The provisions of this Act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the controller shall not apply in the case of a debtor whose affairs are under liquidation by arrangement, but the close of the liquidation may be fixed, and the discharge of the

(1) 7 Bing. 508.

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debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution at such time and in such manner and upon such terms and conditions as the creditors think fit." The mode of proceeding, therefore, is different; namely, by special resolution simply, instead of, as in sect. 48, either upon payment of a dividend of 10*s.* in the pound or upon a resolution to the effect that the bankrupt is not responsible for his inability to pay that amount, but there is no other difference, for subs. 10 enacts that the trustee shall report the discharge of the debtor, "and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under this Act."

Now neither in bankruptcy nor in liquidation proceedings is it made absolutely compulsory upon the Court to grant an order of discharge, although, unless some very exceptional cause exists, a bankrupt who had paid 10*s.* in the pound, or whose creditors had passed a resolution to the effect that he was not responsible for its non-payment and that they desired his discharge notwithstanding, would no doubt receive his discharge. But in the latter case the discharge in bankruptcy would be the voluntary act of the creditors just as much as it is when they pass the resolution under s. 125; and I can assign no reason why in one case the surety should remain liable, and in the other is to be free from liability.

It is further contended that there is no distinction between the case of proceedings by way of liquidation under s. 125 and of proceedings by way of composition under s. 126. But when s. 126 is examined it is manifest that there is an essential distinction. There is no provision similar to that contained in subs. 10, that a discharge under a composition shall have the same effect as a discharge in bankruptcy; and the omission was no doubt made advisedly. The composition proceedings are entirely the act of the parties themselves, and they differ from either bankruptcy or liquidation by arrangement in this, that the debtor in case of a composition may be left in possession of his property, or one creditor might hold a great part of it. It is not surrendered to a trustee for the benefit of all his creditors, and thus the surety, if

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he could be sued by a creditor, might find himself without any means of indemnifying himself against the demand. The principle laid down in *Browne* v. *Carr* (1) has no application, therefore, to a composition deed or a composition resolution. That case was one of a discharge in bankruptcy effected under the then bankrupt laws by a certain number of creditors signing the debtor's certificate—a perfectly voluntary act on their part—and yet it was held that the sureties were not discharged. In delivering judgment, Tindal, C.J., says (2): "The ground upon which it has been contended that this proceeding amounts to a release is the generally acknowledged principle that wherever the creditor so deals with his debtor as to alter the rights of the surety against the debtor, the surety is discharged;" and he gives as an instance the case of a creditor, without the surety's consent, agreeing to postpone the day for paying a debt, and also another illustration. He then proceeds: "In these and in all similar cases, however, the act done by the creditor is his own act, over which the surety has no control, and the injury which the surety would receive is one which he has no mode of preventing. But in the present case neither of these circumstances occur. The legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor where the creditor has proved or may prove himself where the creditor shall not have proved under the commission. It is the duty of the surety to pay the debt, and if he declines so doing, and thereby permits the creditor to prove, the signing of the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered as an act done by the creditor which altered the surety's right without his control, and scarcely, indeed, without his consent. It is not an act beyond his control, for he might have paid the money in due time and prevented the creditor from proving, and if he voluntarily lies by, and omits the only means of preventing it, he may not unreasonably be assumed to have assented to the act." This language applies exactly to the present case, for here, as in an ordinary bankruptcy, the surety might have paid the debt and proved under the liquidation. By paying the creditor he might have acquired all the creditors' rights; but he failed to pay, and it cannot therefore be said that the

(1) 7 Bing. 508. (2) 7 Bing. at p. 514, 515.

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discharge of the debtor by the creditor was a voluntary act by the creditor which he had no power to prevent. But, further, Tindal, C.J., thus expresses himself (1): "The signing of the certificate, where the creditor is satisfied that the bankrupt has conformed to the provisions of the statute, is a moral obligation on the creditor; it is a power vested in him by the Act which he is morally bound to exercise where the truth of the case requires it." The same remark applies to a liquidation where, as in bankruptcy, the debtor parts with his whole property and conforms to the provisions of the statute, and conducts himself unimpeachably. The creditors in such a case are morally bound to release the debtor, and they do not by so doing discharge the surety.

Two arguments, however, remain to be noticed. It is said that the form given in the schedule for a discharge under a liquidation shews that the discharge may be made conditionally, and therefore it is argued that, because the discharge in this case is not expressed to be with a reservation of rights against the sureties, therefore the sureties are discharged. That is a strange construction to put upon the form; to say, that because there is a blank space it must be filled in a particular manner, or else that the sureties are discharged. The blank space is probably left to be filled in, if necessary, by specifying certain acts which the bankrupt might properly be called on to do—to execute deeds or powers, for example—before his discharge was absolutely given to him. I cannot conceive that it in any way can affect the rights or liabilities of the surety.

Lastly, the case of *Cragoe* v. *Jones* (2) was relied on by the defendant; but that decision turned on the language of a composition deed, by which the parties had agreed between themselves that the debtor should be discharged in like manner as though he had been adjudged bankrupt and received his discharge in bankruptcy. This was their own language, and as they had not expressly agreed that the surety should remain liable, he was held to be released also. The case has no application here, where the law itself pronounces that the surety's liability remains. For these reasons, therefore, I think that the plaintiff is entitled to judgment.

CLEASBY, B. I am of the same opinion. The general question

(1) 7 Bing. at p. 516. (2) Law Rep. 8 Ex. 81.

is as to the effect of liquidation on the position of the surety of the person liquidating, and we have to consider whether a discharge under a liquidation is to be regarded as a voluntary act of the parties. We are not dealing with a deed of composition or with a deed of arrangement under the previous bankruptcy law. The effect of a deed of arrangement has been much considered in the case of *Bateson* v. *Gosling*. (1) In that case the debtor had made over the whole of his property to the trustee, but the deed of arrangement contained a clause of release reserving expressly the rights against the sureties; and the effect of the decision is, that if the deed of arrangement had resulted in an absolute discharge of the principal debtor, then, following the judgment of Vice-Chancellor Wood in *Webb* v. *Hewitt* (2), it would have operated so as to discharge the surety altogether; but that, where the deed contains a clause reserving all the rights of the surety, it has not that operation. However, we are not now dealing with the effect of a deed of arrangement, but with the question, whether a resolution in liquidation can be considered a voluntary act of the creditors as regards the principal debtor. We have to consider whether they can be regarded in the present case as having by their voluntary act altered the position of the surety or discharged the principal debtor.

Now the 125th section itself does not throw much light upon what the nature of that act is; but when we refer to the rules (and especially rules 252 and 256), which are made part of the Act of Parliament, we find in reality that liquidation by arrangement is a proceeding in the Court of Bankruptcy, and that although the debtor is the person to move in the first instance, yet he moves with the assistance of the Court of Bankruptcy. By the direction and the assistance of the Court, therefore, proceedings are taken by which the creditors are summoned, and they are to meet together forthwith upon a matter which is to be submitted to them. What is the position of a creditor who attends that meeting—a meeting in the result of which various persons as well as himself are interested, at which a particular question is to be considered, debated, and submitted to the whole body, and at which he votes for this or that particular proposition?

(1) Law Rep. 7 C. P. 9. (2) 3 K. & J. 438.

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In my opinion he is not a volunteer, nor is his act to be regarded as a voluntary act so as to compromise any right of his, except so far as that act involves particular consequences, which are distinctly provided for in the statute. It seems to me—and it is in this view that the authority of *Browne* v. *Carr* (1) is important—that whether we regard the act by which he votes in favour of liquidation, or whether we regard the act by which he votes in favour of discharge, the same character is to be attributed to that act. It is not to be regarded in any manner as an act compromising his rights, because he voluntarily does it. It is worth notice that all the forms connected with this 125th section are headed "In the London Court of Bankruptcy," and the creditor finds himself summoned by the Court, as it were, to attend. That is the real foundation of the decision which I have to give, that this is not to be regarded in consequence of the way in which it is done as a voluntary act of the creditor so as to compromise his rights.

With reference to what has been said as to the form of discharge and as to there being a possibility of a discharge on particular conditions, there is no doubt that the Act, or rather Rule 302, which is a part of the Act, contemplates a discharge with or without conditions, but in my opinion this makes no difference whatever, as far as the surety's liability is concerned.

AMPHLETT, B. I am of the same opinion. With regard to the point of law respecting the discharge of the surety, the case has been so fully gone into by my Lord and my learned Brother Cleasby, that I shall avoid taking up the time of the Court by any lengthened observations.

We start with this admitted fact, which cannot be disputed, that in bankruptcy proper the surety is not discharged by the release of the bankrupt. And the only question is, whether there are any reasons in or out of the Act that would lead the Court to put a different construction upon the release of a bankrupt under liquidation. Now the proceedings under the 125th and 126th sections are really proceedings in bankruptcy. They have been recently very much considered by the Court of Common Pleas in the case of

(1) 7 Bing. 508.

Megrath v. *Gray* (1), where the Court came to the conclusion that proceedings, not only under the 125th, but also under the 126th section, were proceedings in bankruptcy, and being proceedings in bankruptcy, would be governed by the 49th and 50th sections of the Bankruptcy Act. The 50th section is this: "The order of discharge shall not release any person who at the date of the order of adjudication was a partner with the bankrupt, or was jointly bound, or had made any joint contract with him." Consequently that decision of the Court of Common Pleas would go some way to shew that even in the case of a composition under the 126th section the liability of the surety would remain, for the Court held there that the 50th section, to which I have alluded, would govern a case under the 126th section. However this may be, there can be, I think, no sort of doubt that proceedings under the 125th section are proceedings in bankruptcy, and then I can see no reason why the 50th section should not apply.

Something has been said about the hardship on the surety, and it has been asked, what was he to do? It appears to me his course was perfectly plain. He was surety to the extent of 1300*l.*, and if he did not wish to be bound by the proceedings of the creditors, and the debt had not been proved, he might have paid the 1300*l.*, and then proved for that sum; or if the principal debt had been proved, he might have applied to reduce the proof. In either case he had it in his power to take what proceedings he thought most to his interest in the bankruptcy.

Further, I agree with my Lord and my learned Brother that there is no reason why the rule in bankruptcy proper should not be applied in this case, because it has been shewn that in a liquidation the bankrupt parts with the whole of his property and vests it in the trustee, just as in a bankruptcy.

The case of *Wilson* v. *Lloyd* (2) has been cited; but that was a decision under the 126th section, although the head-note to the case does not clearly state the fact, and the learned judge in giving judgment expressed no opinion as to whether a resolution passed under the 125th section would have the effect which no doubt he did attribute to a resolution passed under the 126th section. *Wilson* v. *Lloyd* (2) is a strong authority to shew that under

(1) Law Rep. 9 C. P. 216. (2) Law Rep. 16 Eq. 60.

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the 126th section there would not be a reservation of rights against the surety, but is no authority that proceedings under the 125th section would have that effect. If the question should ever arise under the 126th section, it would have to be considered whether the decision in *Wilson* v. *Lloyd* (1) is consistent with the judgment of the Court of Common Pleas in the case of *Megrath* v. *Gray*. (2) As far as I am concerned, I do not wish to express any opinion as to what would be the effect in this respect of proceedings under the 126th section.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Jones, Blaxland, & Son, for John Miller, Bristol.*

Attorneys for defendant: *Deane, Chubb, & Son, for C. H. Edwards, Birmingham.*

Nov. 20.

THE ATTORNEY GENERAL *v.* ALEXANDER AND OTHERS.

Income Tax—"Person residing within the United Kingdom"—Foreign Corporation—16 & 17 Vict. c. 34, *s.* 2, *sch. D.*

The Imperial Ottoman Bank was a corporation created by Turkish law. Its seat was fixed, by the concession and the statutes which constituted it, at Constantinople, with power to establish branches and agencies at other places. It was the state bank of Turkey, where it was a bank of issue, and was charged with the collection of the revenue, and with certain operations relating to the currency, and with the payment of interest on the public debt, and received from the state a subsidy on account of the public business transacted by it.

On its creation it took over and continued to carry on the business of an English bank in London; and since its creation in 1863, the annual meetings of shareholders had always been held, and dividends declared, in London, though by its statutes the annual meetings might be held at any place which the committee of management might fix:—

Held, that the bank was not liable to be assessed to income tax in respect of its whole profits, as a "person residing within the United Kingdom" under the 1st clause of schedule D to s. 2 of 16 & 17 Vict. c. 34; but was liable only in respect of the profits arising from its business carried on in England, under the 2nd clause of the schedule.

CASE stated under 22 & 23 Vict. c. 21, s. 10, in a proceeding brought by the Attorney General against the defendants, who were agents in England for the Imperial Ottoman Bank, for a

(1) Law Rep. 16 Eq. 60. (2) Law Rep. 9 C. P. 216.

penalty of 50*l.*, under s. 55 of 5 & 6 Vict. c. 35, for neglecting to deliver in a proper return of profits under the Income Tax Acts, of which the material sections are to the following effect:—

By schedule D to the 2nd section of 16 & 17 Vict. c. 34, duties are granted to the Crown (inter alia) "For and in respect of the annual profits or gains arising or accruing to *any person residing* within the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be carried on in the United Kingdom or elsewhere.

"And for and in respect of the annual profits or gains arising or accruing to any *person* whatever, whether a subject of Her Majesty or not, *although not resident* within the United Kingdom, from any . . . profession, trade, employment, or vocation exercised within the United Kingdom;" and by s. 5 the duties imposed by that Act are directed to be assessed under the regulations of 5 & 6 Vict. c. 35, and the Acts therein mentioned or referred to.

By 5 & 6 Vict. c. 35, s. 40, it is enacted that "all bodies politic, corporate or collegiate, companies, fraternities, fellowships or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with," and that certain officers of such corporations, &c., shall be answerable for doing such acts as the Act requires in order to the assessment of such bodies corporate, &c., to the duties granted by the Act, and paying the same; which acts include, under another section of the statute (s. 54), the making a return for the purpose of assessment.

By s. 42, "Any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of any trustee, &c., or of any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof;" and such trustees, &c., are made answerable for the doing of all acts required by the Act in order to the assessment of such persons to the duties granted by the Act, and paying the same.

By s. 100, the duties granted by s. 1, schedule D (corresponding with schedule D to the 2nd section of 16 & 17 Vict. c. 34), are

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directed to be assessed under certain rules, and rule 2 under the First Case in the section provides that "the said duty shall extend to every person, body politic or corporate, fraternity, fellowship, company, or society, and to every art, mystery, adventure, or concern carried on by them respectively in Great Britain or elsewhere."

By s. 106, "Every person engaged in any trade, manufacture, adventure, or concern, shall be chargeable by the respective commissioners acting for the parish or place where such trade, &c., shall be carried on, &c., whether such trade, &c., shall be carried on, &c., wholly or in part only in Great Britain."

By 5 & 6 Vict. c. 80, s. 2, "All persons intrusted with the payment of annuities, or any dividends or shares of annuities, payable out of the revenue of any foreign state to any persons, corporations, companies, or societies in Great Britain, or acting therein as agents, or in any other character," are to make a return of the same as therein mentioned, and are to pay the duty on such annuities, &c., out of the monies in their hands, on behalf of the persons entitled to the same; and by 16 & 17 Vict. c. 34, s. 10, these provisions are extended to "all interest, dividends, or other annual payments payable out of or in respect of the stocks, funds, or shares of any foreign company, society, adventure, or concern," and intrusted to persons in the United Kingdom for payment.

By various subsequent Acts the duties granted by 16 & 17 Vict. c. 34 were continued; the Act imposing the duty for the year 1871 being 34 & 35 Vict. c. 21.

The facts as to the constitution and business of the Imperial Ottoman Bank were stated in the following paragraphs of the case:—

16. Towards the close of the year 1862 the Ottoman Bank of London, which was a banking company established and carrying on business in London, arranged to transfer its business to the Imperial Ottoman Bank, which was a Turkish corporation incorporated according to the laws of Turkey by a firman of the Sultan.

17. The transfer of the business was completed in the beginning of the year 1863, by the issue of shares in the capital of the Imperial Ottoman Bank to the amount of 250,000*l.* (part of the total capital of 2,700,000*l.*) to the shareholders of the Ottoman Bank of London, and the business in London of the Imperial Ottoman Bank as

bankers was then commenced in London, under the management of the London members of the committee hereinafter referred to, in the premises theretofore occupied by the Ottoman Bank of London. The remainder of the capital was subscribed in Constantinople, Paris, London, and other places. Immediately on the formation of the Imperial Ottoman Bank, preparations were made to commence business in Constantinople, and it actually commenced business there on the 1st of June, 1863.

18. The affairs of the Imperial Ottoman Bank were then, and have ever since continued to be, regulated by a concession from the Government of Turkey and certain statutes. (1)

19. By the concession the bank is established as a state bank for the Ottoman Empire. It is made subject to the general laws of the Empire, and its seat is fixed at Constantinople, with power to establish branches and agencies at other places.

20. The concession provides that the Ottoman government shall exercise its control over the bank by means of a high commissioner chosen by the government, who has the right to take cognisance of its operations, though without power to interfere in its administration, and who is to see to the faithful execution of the statutes. It further provides that the bank shall be administered at Constantinople by a board of two or three members, and a council of administrators of three members, both to be named by a committee chosen by the London and Paris founders, and this committee is to have power, in conformity with the statutes, to guide, control, and superintend the operations of the bank.

22. The concession grants to the bank, in addition to the right of carrying on the ordinary business of bankers, the exclusive privilege of issuing in Turkey notes payable to bearer on demand, payable at Constantinople or at the branches. These notes are made legal tender in certain parts of Turkey. They must be in the Turkish language, and must bear the seal of the high commission of the government.

23. The concession charges the bank at Constantinople with all the operations of the government treasury; that is to say, the receipt of all the revenues of the empire coming to the impe-

(1) A translation of the concession and statutes accompanied the case; the material parts are stated in the following paragraphs.

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rial treasury at Constantinople, and the payment of all drafts issued upon it by the minister of finance. The bank may further be charged at certain branches in Turkey with the receipt of the provincial revenues. For these services the concession provides that the bank is to receive a fixed annual payment of 20,000*l.*

24. The concession specially charges the bank with the payment of interest upon, and the redemption of the Public Interior Debt, and with the transmission of funds for the payment of interest and redemption of the Exterior Debt, for which it is provided that the bank shall receive a commission at a fixed rate of 1 per cent.

25. The concession further constitutes the bank the recognised financial agent of the government both at home and abroad, and charges it with all operations concerning the withdrawal from circulation of the beschliks, a kind of paper money then in circulation.

26. By the statutes above referred to it is declared that the bank is formed for the purpose of carrying into effect the privilege of the bank as defined in the concession, and the operations to be undertaken are defined in accordance with the concession. By the statutes the seat of the bank was fixed at Constantinople, where, accordingly, as already stated, in or about the month of June, 1863, and some months after the commencement of its business in London, the bank commenced business. By the same statute the bank was authorized to establish such branches and agencies as it should think fit.

27. By the statutes the administration of the bank in Constantinople is confided to a director-general, one or two assistant directors, and a council of administration of three members. These are appointed by a committee of from twenty to twenty-five members, of whom ten at least must be English or resident in England, and ten at least French or resident in France. This committee has the general guidance, control, and superintendence of the operations of the bank, and its members are elected by the general meeting of shareholders. The statutes further require that the committee shall meet four times a year alternately in London and Paris, and the committee has, in fact, met and still does meet sometimes in London and sometimes in Paris. The execu-

tion of the decision of the committee, and the more immediate supervision of the affairs of the bank, is assigned under the statutes to a sub-committee (appointed by the general committee), consisting of eight members, of whom four are chosen from the English and four from the French section of the general committee.

28. It is provided by the statutes that the London members of the committee shall be charged, under the control of the sub-committee, with the management of the London agency of the bank; and since the early part of 1863, when the business of the bank in London commenced, until the present time, the London business of the bank, being the ordinary business of bankers, has been carried on under the management of the London members of the committee in premises in the city of London. The said last-mentioned persons have the receipt of all the gains and profits arising and accruing from the trade and business of the bank carried on within Great Britain.

29. It is provided by the statutes that the annual and extraordinary general meetings shall be held at such places as the committee shall fix; such meetings in fact have always been and still are held in London, and at such annual general meetings the report of the committee, with the accounts for the preceding year, are received, the dividends are declared, and members of the general committee are elected.

On the 3rd of April, 1872, the following return was made by the defendants on behalf of the bank:—"The London agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople, in the empire of Turkey. The said London agency consists of the following persons [here followed the names of the defendants]. The amount of profits and gains accruing to the said bank from the trade of bankers exercised within Great Britain, viz., at London, for the year ending 5th April, 1872, computed on a fair and just average of three years ending the 31st December, 1871, the last-mentioned day being the day on which the accounts of the said bank have been usually made up, and deducting the part on which income-tax has been already paid by deduction, is 40,000*l*. The London agency of the bank decline to make any return of the profits accruing to the bank from

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business carried on by the bank elsewhere than in the United Kingdom, being advised that such profits are not liable to income-tax."

The defendants also made a return under 16 & 17 Vict. c. 34, s. 10, of moneys intrusted to them for the payment of dividends upon shares of the bank to persons in the United Kingdom.

The Commissioners of Inland Revenue contended that the bank was bound to make a return of all its annual profits, whether made in the United Kingdom or not, and was chargeable thereon under Schedule D.

The question for the opinion of the Court was, whether the bank were bound to make a return of and were chargeable upon all its annual profits, whether made in the United Kingdom or elsewhere, or whether they were only bound to make a return of and were chargeable upon the profits made in the United Kingdom, and of so much of the profits made abroad as were remitted to this country for distribution in London.

Sir R. Baggallay, A.G. (*Holker, S.G.*, and *Pinder* with him), for the Crown. The Imperial Ottoman Bank is a person "residing within the United Kingdom," within the meaning of the first clause of schedule D. If an individual resident in a popular sense in one country, that is, having there his private establishment where he lived and slept, had also establishments in other countries where he carried on business, not merely through agents, but directly by his clerks and servants, he would properly be said to reside wherever he so carried on business. Admitting that in the case of a natural person so carrying on business, he would only be liable to assessment on the whole of his profits if he were resident in the United Kingdom in the sense of living and sleeping there, the case is different with respect to a corporation, which cannot have a residence in the same sense as a natural person. Such a body has no locality except by its acts and must be said to reside where its substantial business is carried on. It was on this principle that in *Newby* v. *Colt's Patent Firearms Manufacturing Co.* (1) it was held that a foreign corporation so carrying on business in England could be served

(1) Law Rep. 7 Q. B. 293.

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with process here. In the case of the Imperial Ottoman Bank a residence of this kind is clearly shewn. Not only is it the successor to an English corporation, the Ottoman Bank of London, and carries on the same banking business on the same premises, but it appears from its mode of carrying on its general business that London is its head quarters, the accounts being made up, the annual meetings held, and dividends declared here. The case of *Sulley* v. *Attorney General* (1) is not opposed to this view, for, in the first place, the decision there turned on the question, whether there was any trade carried on in the United Kingdom within the second clause of schedule D, as to which the Exchequer Chamber held that there was not; and, in the second place, the case related to a partnership of individuals residing in different countries, and not to the case of a corporation.

[KELLY, C.B. If carrying on business constitutes residence, what is the meaning of the words in the second clause of schedule D, "although not resident within the United Kingdom"?]

The second clause, although applicable to natural persons, is not applicable to corporations, whose residence must be determined by their operations, or is only applicable where they do not carry on business directly.

Matthews, Q.C. (*Arthur Wilson* with him), for the defendants. The words referred to by the Court are a conclusive argument against the construction contended for by the Crown; and it is further shewn by s. 39 of 5 & 6 Vict. c. 35, that the word "residence" is used in these Acts by the legislature in its ordinary sense. No such distinction as is suggested between a natural person and a corporation is drawn by the Act, which only taxes a corporation as a "person;" and, unless residence in the case of a corporation is something altogether different from residence in the case of a natural person, the case of *Sulley* v. *Attorney General* (1) is an authority for the defendants; for if the firm in question could have been treated as resident here on the ground of its carrying on business here, it would have been unnecessary to consider whether the case fell within the second clause of schedule D; it would have fallen within the first. But there is no difficulty in de-

(1) 5 H. & N. 711; 29 L. J. (Ex.) 464. 6 Jur. N.S. 1018

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termining what is the residence of a corporation. It resides in the place where its legal seat is, that is, in the country by virtue of whose laws it was created and exists. Its status may be and is recognized by the laws of other countries, so as to give effect to its transactions abroad, but its seat and residence can only be in the country where it is constituted. The position of a corporation beyond the limits of its own state has been frequently considered in the United States, where each state has the power of creating corporations, and in a series of decisions this view has always been taken: *Bank of Augusta* v. *Earle* (1); *Ohio and Mississippi Ry. Co.* v. *Wheeler* (2); *Baltimore and Ohio Ry. Co.* v. *Glenn* (3); *Blackstone Manufacturing Co.* v. *Inhabitants of Blackstone.* (4) The Imperial Ottoman Bank, therefore, being a Turkish corporation, and existing only by virtue of the law of Turkey, which fixed its seat at Constantinople, resides in Turkey, and in no other country. The case of *Newby* v. *Colt's Patent Firearms Manufacturing Co.* (5) has no bearing on the question of residence; the decision was, not that the defendants resided in England, but that their manager here was an officer who might be served with process. The question was one of jurisdiction, and jurisdiction does not depend on residence, but on the party served being within the territorial jurisdiction of the Court; there the party served, being within the jurisdiction, was held to be such a person as, in case of a corporation, is appointed by statute as the person to be served with process.

A case more nearly in point is *Kilkenny and Great Southern and Western Ry. Co.* v. *Feilden* (6), where it was held that an Irish corporation suing here must give security for costs, although the office of the company, where all its business was transacted, and all its property were in England, and four-fifths of its shareholders resided here. And in cases under the County Court Act, 9 & 10 Vict. c. 95, ss. 60, 128, where the question has arisen, whether a railway company resided or "dwelt" within a county court district, it has been always held that it "dwelt" at its

(1) 13 Peters, 519, 588, 589.
(2) 1 Black, 286, 295.
(3) 28 Maryland Rep. 287.
(4) 13 Gray (79 Mass. Rep.), 488.
(5) Law Rep. 7 Q. B. 293.
(6) 6 Ex. 81; 20 L. J. (Ex.) 141.

principal place of business only: *Adams* v. *Great Western Ry. Co.* (1); *Shiels* v. *Great Northern Ry. Co.* (2); *Brown* v. *London and North Western Ry. Co.* (3) If it becomes necessary to inquire where the real head-quarters of the Imperial Ottoman Bank were by reference to its operations, it can hardly be doubted that its principal operations are in Turkey, where it is a bank of issue, and is the state bank, and is charged with the collection of the revenue, and is subjected to the supervision of the government, and receives a subsidy from the state in respect of the public business transacted by it, while it acts in England only through its London agency. The proposition contended for by the Crown would lead to the practical absurdity and injustice, that a corporation which carried on business in several countries would be liable, under statutes similar to the Income Tax Act, to be taxed in respect of its whole profits in each country, in addition to the taxation imposed on dividends payable to the shareholders receiving payment through funds transmitted to this country.

Holker, S.G., in reply.

KELLY, C.B. The question in this case is, whether the defendants, who represent a banking corporation called the Imperial Ottoman Bank, are liable to be assessed to the income tax in respect, not only of the profits realised by the branch or agency of the bank established in London, amounting to 40,000*l.*, as to which they admit their liability, but upon the whole profits of the corporation realised in England, France, Turkey, or elsewhere, which amount to no less than 278,395*l.*; and this question is, no doubt, one of great importance to the Imperial Ottoman Bank and other corporations similarly situate.

It is contended on behalf of the Crown that they are liable to be assessed in respect of the whole of their profits, on the ground that the corporation comes within the first clause of schedule D to 16 & 17 Vict. c. 34, s. 2, which provides that income tax shall be payable "for and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same

(1) 6 H. & N. 404; 30 L. J. (Ex.) 124.
(2) 30 L. J. (Q.B.) 331.
(3) 4 B. & S. 326; 32 L. J. (Q.B.) 318.

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shall respectively be carried on in the United Kingdom or elsewhere"; and the question, therefore, is, whether this corporation, the Imperial Ottoman Bank, can be said, on the facts stated, to reside within the United Kingdom. Now, I am clearly of opinion that upon the case now before the Court, the Imperial Ottoman Bank cannot be said to be resident in this country; that the business carried on in London is a mere branch or agency, and not the bank itself; and that London is not the chief seat of carrying on the business of the bank. This is, I think, conclusively settled by the language of what we may term the charter of incorporation, that is, the convention relating to the concession, the 6th article of which is as follows: "The seat of the bank shall be at Constantinople; with the authority of the government it shall establish as many branch establishments and agencies as it may judge convenient"; in conformity with which the statutes of the bank provide, art. 4: "The society has its seat at Constantinople, it can establish as many branches and agencies as it may think fit." If, therefore, this corporation can be said to be resident anywhere, I am of opinion that it must be resident in Constantinople, where alone it has its "seat," under the express terms of its charter; and the branches or agencies, which it establishes in London, Paris, or elsewhere, are not the establishment, the bank itself, but only branches of that bank which has its seat at Constantinople.

Beyond the language of the concession, which is plain and clear enough, and cannot well admit of any other construction, it may be observed that the establishment in London is throughout alluded to in the case not as the chief seat of the society, or as the corporation itself, but as an agency. Thus, in the return made by the defendants it is stated (and there is nothing in the case to control or qualify the language used), "The London agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople, in the empire of Turkey"; so that the establishment in London is described and, having reference to the charter or concession, is correctly described as "the London agency" merely. I think, therefore, that we cannot hold that this is a corporation residing in the United Kingdom within the 1st clause in schedule D.

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It is important to observe the distinction between the liability of a person and that of a corporation. If a person resided in London deriving profits from some business carried on either in the United Kingdom or elsewhere, he would be liable only for the profits which he himself personally acquired. If he had a banking house at London, another at Paris, and another at Constantinople, he would of course be entitled to the aggregate profits of the whole three, and would be liable to assessment in respect of the aggregate amount. But if he carried on business in this way in partnership he would be liable, not for the whole profits of the undertaking, but only for his share of the profits, whatever it might be. If, however, we were to hold this corporation to be a person residing in the United Kingdom, then the corporation, acquiring the whole aggregate profits, would be liable to assessment upon the aggregate amount.

If, then, this corporation is not within the 1st clause of schedule D, I do not think it is necessary to say more than that the 2nd clause is one which may well be held to provide for the case. Here, therefore, a branch establishment existing within the United Kingdom, and a profit to the extent of 40,000*l.* a year being realised at this branch, the corporation, as represented by the defendants, are liable to assessment on that amount, and no more.

CLEASBY, B. I am of the same opinion. The question arises upon the first branch of schedule D. The word "person" is used both in the first and the second branches; but we must recognise a corporation as coming within the meaning of the word "person" in both branches, because, by the 5 & 6 Vict. c. 35, s. 40, an officer is appointed to make the return in respect of a corporation, which return has been so made in the present case. It has not been contended—it cannot be said—that the whole business of the corporation is "carried on" in London. Some of the paragraphs of the case, indeed, shewing that the annual general meetings of shareholders have always been held in London, seem to point in that direction; but that proposition has not been contended for. Therefore we have to deal with this question merely upon the words "any person residing in the United Kingdom." Now, if re-

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sidence could not be predicated of a corporation, if the idea were not applicable to a corporation under this Act of Parliament, then, of course, the first branch of the schedule could not apply. The argument, however, is not put upon that ground; and we have to consider whether it is made out, not only that the word "person" is fulfilled by this body, which is a corporation, but whether the terms "residing within the United Kingdom" are also satisfied. Now, no doubt, in speaking of a corporation, which is a different thing from the persons composing it, there is a difficulty in dealing with the question of residence; but without defining the word "residence," which I should not attempt to do, there are in the Act certain clauses which limit its meaning, and give us some guide in considering whether a person does or does not come within the words "residing in the United Kingdom."

The learned counsel for the defendants has referred us to the case of *Sulley* v. *Attorney General* (1), as if it decided that a partnership which carried on a business in England could not be regarded as resident here. But, in point of fact, the case does not decide that, because what was held in that case was, that there was no business at all in England which was liable to income tax. I do not, therefore, regard that case as having any bearing on the present, in which undoubtedly business is carried on here.

But to what do the learned counsel for the Crown refer as shewing that this corporation can be regarded as residing in England? They refer to the various sections of the case, which shew that certain acts were done here; but, following the course taken by the Lord Chief Baron, it appears to me sufficient to say that, looking at the constitution of the Imperial Ottoman Bank, we can see it did not carry on business in England in such a sense that we should be justified in saying it resided here. The Ottoman Bank of London had undoubtedly carried on its business in England, and had resided here; but that bank transferred its business to the Imperial Ottoman Bank, which was quite a different institution; and when we refer to what it is, we find that it is established as the state bank for the Ottoman Empire, that its seat is fixed at Constantinople; that the concession grants to it, in addition to the right of carrying on the ordinary business of

(1) 5 H. & N. 711; 29 L. J. (Ex.) 464.

bankers, the exclusive privilege of issuing in Turkey notes payable to bearer on demand, payable at Constantinople or at the branches, which notes must be in the Turkish language and must bear the seal of the high commissioner of the government. Then the concession charges them with the receipt of all the revenues of the empire coming to the imperial treasury at Constantinople, and the payment of all drafts issued by the minister of finance; and, as a bank, they are to be paid in a particular way in respect of all these matters. It certainly appears to me that it would be most unreasonable to say that the bank, when it issued notes in the Turkish language constituting the currency of Turkey, could be regarded in any sense as carrying on its business in London; and in the same way it would be wholly unreasonable to regard a bank, the business of which was to receive all the revenues of the empire coming to the imperial treasury at Constantinople and to pay all drafts there for carrying on the government, as carrying on its business in London, so as to be regarded as resident there. This is really sufficient for my judgment in this case, which is, that it is not made out that the Imperial Ottoman Bank is resident in England, or is even carrying on its business here, although some of its business is carried on here; and the judgment of the Court must therefore be for the defendants.

AMPHLETT, B. I am of the same opinion. The question entirely depends on whether or not, under the circumstances of this case, the Imperial Ottoman Bank is a "person residing within the United Kingdom" within the meaning of this Act of Parliament. Now, the way in which the Attorney General first proposed to argue (though he afterwards very fairly retreated from that position) was this, that a person carrying on business in London or elsewhere might be said to reside where he was carrying on business; so that, if he had two or three establishments in different countries, he might be said to reside in any of these countries. But, on my putting to him whether, in the case of a person, say, for example, M. Lafitte, living in the ordinary sense only in Paris, but having an establishment in London carried on in his name by his agents, he could say that such a person could be regarded as residing in London as well as in Paris, so as to be chargeable

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with the whole of the profits which he made, not only in London, but in Paris, he said that he did not wish to carry his argument so high; and, indeed, this would be attended with such monstrous injustice that I was not surprised he did not insist on it. But if that is so—if an individual cannot be said to reside wherever he carries on his business, how can a foreign corporation be said to reside within the kingdom for no other reason than that it carries on business there? It must follow the same rule.

What, then, is the reasonable meaning of a corporation residing anywhere? It appears to me that it is this, that a corporation may be said to reside wherever it has its seat. Now, here, any one looking, not only at the language of the concession which establishes the bank abroad, but at the duties which it has to discharge, would, I think, hesitate to say that this bank, which exists only as a corporation in Turkey, and is not a corporation anywhere else, and which has its seat in Constantinople, resides in the United Kingdom. We should be putting a very great strain on language if we were to hold that because a foreign corporation is, not only in language but according to the facts, carrying on a branch business in London,—the main part of its business, and the most important part, being in Constantinople, where it is the Imperial Bank,—that corporation is residing as a corporation within the United Kingdom. For these reasons I think the first part of the question must be answered in the negative.

Judgment for the defendants.

Attorney for the Crown: *Solicitor of Inland Revenue.*
Attorneys for defendants: *Bircham & Co.*

[IN THE EXCHEQUER CHAMBER.]

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Dec. 2.

BAXENDALE AND OTHERS *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Damages—Recovery of Costs of Litigation—Separate Contracts—Proximate Cause.

H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by the defendants of the pictures over a part of the distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants, and requested them to defend it. The defendants refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The defendants paid the damages into court, and disputed their liability as to the costs :—

Held (reversing the judgment of the Court below), that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs and the defendants having been separate and independent. *Mors Le Blanch* v. *Wilson* (Law Rep. 8 C. P. 227) (Lush, J., dissenting) disapproved.

APPEAL from a decision of the Court of Exchequer, discharging a rule to enter a verdict for the defendants.

The facts of the case are as follows:—On the 6th of October, 1871, Robert Harding delivered to the plaintiffs, who are carriers and forwarding agents, a case containing two pictures for transmission to Paris; and at the same time his agents filled up and signed a foreign declaration and consignment note, in which the value of the pictures was stated to be 1000*l*. On the same day, the plaintiffs delivered the case to the defendants to be forwarded to their agents at Calais. A consignment note was signed by the plaintiffs, describing the goods as "one case pictures, value 1000*l*." This consignment note was subject to various conditions, exempting the defendants from liability in certain contingencies, which however did not happen. The case was forwarded by the defendants and reached Dover safely; but in course of shipment was, through the negligence of their servants, dropped into the sea and the pictures were damaged by sea water. The defendants having informed

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the plaintiffs of the accident, the plaintiffs on the 11th of October, wrote them as follows: "The senders of the goods have been to examine them, and state that the pictures are utterly spoiled and the amount given in the declaration does not near cover the value thereof, and a claim will be made. We are afraid you are not, under the circumstances, protected by the Carriers' Act for the damage done, and we shall be glad to know if you will accept the claim, or what you intend doing in the matter." The defendants, on the 24th, replied, declining all liability. On the 28th of November Harding made a claim of 1000*l.* on the plaintiffs, who refused to entertain it, on the ground that the pictures had not been insured in accordance with the Carriers Act. He thereupon commenced an action against them, and they wrote to the defendants on the 12th of December, informing them of the fact in these terms:—"A writ has now been issued: will you kindly inform us whether you will defend by your own solicitors, or if you wish us to do so on your account? It would be a great mistake to have two actions: one against us and then another against you." Not having received any answer, on the 15th of December the plaintiffs again wrote, "requesting instructions," and on the same day the defendants' attorney wrote:—"I am unable to give you any instructions, but must leave you to deal with the case as you think fit. I am not aware whether, when the case of pictures was delivered to you for carriage, a declaration was made and insurance paid. This company received it only as an ordinary parcel." On the 8th of January, 1872, declaration was delivered in *Harding* v. *Baxendale and Others*, and on the 13th of January the plaintiffs forwarded a copy of it to the defendants' attorney, again requesting the defendants to undertake the defence or, if not, to make any suggestion as to the defence which should be raised. They added, "The defendants will hold your clients responsible for the damages which the plaintiff may be held entitled to recover as well as for the costs which the defendants may incur to the plaintiff and to their own solicitor in defending the action." The defendants' attorney replied on the 16th of January, declining to offer any suggestions as to the defence of the action.

The plaintiffs continued to defend the action, although they received, whilst it was still pending, an opinion from their counsel

that the Carriers Act afforded no defence, and that they would not be successful.

They pleaded the general issue, liberty being given them by a consent order to raise, under this plea, the defence that they had received the goods as mere forwarding agents, and also that they were protected by the Carriers Act.

A part of the expenses incurred related to special defences set up by them and the remainder to the value of the pictures. Upon receiving notice of trial they again communicated with the defendants, who however continued to decline to make any suggestion as to the defence. The plaintiffs having delivered their briefs were again advised that the Carriers Act afforded no defence. They wrote on the 19th of June, 1872, to inform the defendants of the unfavourable opinion they had received, and asked whether they should endeavour to settle the action. The defendants' attorney replied, "I cannot, under the circumstances of the case, take any course implying assent on the part of the company to the settlement of the action, as they are prepared to defend any proceedings against them on the question of legal liability."

The cause of *Harding* v. *Baxendale and Others* was tried in November, 1872, and resulted in a verdict for the plaintiff for 650*l.* The plaintiffs' costs were taxed at 248*l.* 13*s.* 4*d.*, which, with the damages, the plaintiffs paid to Harding. The plaintiffs' own costs amounted to 260*l.* 4*s.* The present action was brought to recover from the defendants 650*l.* and the costs incurred by the plaintiffs in the defence of the former action. The defendants paid 650*l.* into court, and denied liability as to the costs.

The cause was tried at the Surrey spring assizes, 1873, before Cockburn, C.J., when the above facts were admitted and a verdict entered for the plaintiffs for the amount of the two bills of costs in addition to the 650*l.*, with leave to move to enter a verdict for the defendants, or to reduce the damages to an amount to be settled by the Master. A rule was afterwards obtained accordingly.

June 13, 1873. *Watkin Williams, Q.C.*, and *Murphy*, shewed cause. They relied on *Mors Le Blanch* v. *Wilson* (1) on the

(1) Law Rep. 8 C. P. 227.

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question of the plaintiffs' right to recover the costs. The plaintiffs took under the circumstances a reasonable course in defending the action. It was true they had been advised that the Carriers Act was no defence, but as they knew the defendants intended to rely upon it they were justified in setting it up. Moreover, they were bound to incur some expense in having the damages ascertained.

Day, Q.C., and *W. G. Harrison*, supported the rule, and contended, first, that the contracts between the plaintiffs and Harding, and between the plaintiffs and defendants, being entirely distinct, the costs incurred in defending Harding's action could not be considered as in any sense the natural consequence of the defendants' breach of contract; and, secondly, that the plaintiffs had not taken a reasonable course under the circumstances.

Cur. adv. vult.

June 27. The judgment of the Court (Bramwell and Cleasby, BB.), was delivered by

CLEASBY, B. This was one of those cases in which a person incurs a responsibility in consequence of the neglect or default of another in some duty owing to him, and a question of some difficulty arises in it as to how far he can make that other responsible for costs he has incurred in defending an action brought against him.

It appears that the plaintiffs had received from Harding two pictures to be forwarded to Paris. They delivered them to the defendants, by whose negligence the pictures fell into the water and were damaged. A claim was then made against the plaintiffs by Harding, and an action brought by him against them. Now, in the first instance, the plaintiffs could obtain very little information to guide them, either in defending the action or in settling it. They could not pay money into Court, for the damage done by the water to the pictures was difficult to ascertain without a regular inquiry by persons competent to deal with the matter. Having regard to the nature of the claim, we certainly think they could not be expected either to settle the claim before action or to pay money into Court; and we think it was the necessary consequence of the defendants' neglect that the plaintiffs should be put to the expense of ascertaining in a proper way the amount of their

liability to Harding, in order that they might recover over against the defendants. So far, therefore, as regards the part of the rule which asks that the verdict should be entered for the defendants, we think it should be discharged; for clearly the plaintiffs were entitled to some costs.

Then the question arises whether this was a case in which the plaintiffs acted fairly and reasonably in defending to the end the action brought against them by Harding; and in considering this question we think we ought to abide by the rule laid down, or rather, I should say, acted upon, in *Mors le Blanch* v. *Wilson* (1), according to which a jury are to give such costs as were reasonably incurred by the plaintiffs in the action brought against them, either in defending the action or otherwise ascertaining the amount of liability. I have already called attention to the nature of the case; I will proceed to consider the conduct of the present defendants in reference to the claim. As soon as it was made the now plaintiffs wrote to the defendants giving them notice, and asking for their advice and assistance. A long correspondence ensued, and eventually the defendants declined all liability in the matter, and left the plaintiffs to take their own course. Still the plaintiffs continue to urge the defendants to do something, and on the 12th of December write: "A writ has now been issued. Will you kindly inform us whether you will defend by your own solicitor, or if you wish us to do so on your account? It would be a great mistake to have two actions—one against us, and then another against you." Unfortunately this is what has taken place, but certainly through no fault of the plaintiffs. The defendants continued to keep them at arm's length, and insisted that, if necessary, they would avail themselves of the protection of the Carriers Act. The result is, that the plaintiffs did all they could to prevent two sets of costs from arising; and it appears to us that the fault having been that of the company, they might fairly and properly have taken on themselves the defence of the action brought by Harding. Instead of doing so, they left the plaintiffs to make the best of the case they could.

Under these circumstances, the result is that the plaintiffs are

(1) Law Rep. 8 C. P. 227.

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entitled to recover from the defendants all costs incurred in having the amount of their liability ascertained, and also all costs attributable to the defence raised under the Carriers Act. They are not entitled to the costs of any defence peculiar to themselves —such as that they were mere forwarding agents and not carriers. It is true that we think the defence, under the Carriers Act, could not be successfully set up; but still we are of opinion that it was quite justifiable on the plaintiffs' part, not only to have the amount of liability established by a jury, but also to put forward the Carriers Act as a ground of defence, as the defendants to the last insisted upon it. We cannot deal with the figures, but with the guide we have given, the parties ought to be able easily to settle the amount.

Rule discharged.

From this decision the defendants appealed.

Dec. 1, 2. *W. G. Harrison* (*Day, Q.C.*, with him), for the defendants, contended that the costs incurred by the plaintiffs in *Harding* v. *Baxendale* were not the natural consequence of the defendants' act. The contracts between the plaintiffs and Harding and between the plaintiffs and defendants, were entirely distinct. [He was stopped.]

W. Williams, Q.C. (*Murphy, Q.C.*, with him), for the plaintiffs. The plaintiffs were bound to incur some expense in ascertaining the real amount of their liability to Harding. They might, it is true, have let judgment go by default; but having regard to the defendants' conduct and insistence that the Carriers Act was a defence, they were not acting unreasonably or improperly in defending the action. The defendants throughout appear to have thought that the Carriers Act was a defence, probably on the ground that although a declaration of value was made no increased rate of charge was paid: see, however, *Behrens* v. *Great Northern Ry. Co.* (1) The costs incurred were, therefore, the legitimate consequence of the defendants' breach of duty; and the case of *Mors le Blanch* v. *Wilson* (2) is strictly applicable. There, as here, there were two contracts.

(1) 7 H. & N. 950; 31 L. J. (Ex.) 299. (2) Law Rep. 8 C. P. 227.

8 Jur. N.S. 567

[QUAIN, J. That case proceeded upon a dictum of Parke, B., in *Tindal* v. *Bell.* (1)]

The principle of the case is a sound one wherever a claim for unliquidated damages is preferred which requires investigation. He also cited *Rolph* v. *Crouch* (2); *Ogle* v. *Earl Vane* (3); Mayne on Damages, 2nd ed. by Lumley Smith, p. 43.

LORD COLERIDGE, C.J. In this case a claim is made against the defendants for the costs incurred by the plaintiffs of an unsuccessful defence offered by them to an action brought against them by one Harding. It appears that the plaintiffs contracted with Harding to send two pictures for him from London to Paris; and that afterwards, by a separate and independent contract, the defendants agreed with the plaintiffs to carry the pictures. In the course of the transit, through the defendants' negligence, the pictures fell into the sea and were damaged. Harding thereupon brought an action against the plaintiffs, who took legal advice, and were told, and rightly told, that they had no defence. The plaintiffs communicated this fact to the defendants, and a long correspondence ensued, the substance of which was that the defendants said to the plaintiffs, "Take your own course in Harding's action. We will have nothing to do with it. When the time comes for you to attack us we shall defend ourselves." The plaintiffs, however, persisted in defending Harding's action, and it went to trial. The plaintiffs were defeated, and then commenced this action, in which they sought to recover from the defendants, not only the damages assessed by the jury as the value of the pictures, but also the costs of their unsuccessful defence. The defendants paid the damages for the injury to the pictures into Court, and denied any further liability. The Court of Exchequer have decided upon the authority of *Mors le Blanch* v. *Wilson* (4) that they are liable to those costs, or, at all events, to so much of them as were incurred by the plaintiffs in ascertaining the amount of their liability to Harding, and in relation to the defence of the Carriers Act. I am of opinion that this decision is

(1) 11 M. & W. 228, at p. 231.
(2) Law Rep. 3 Ex. 44.
(3) Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272.
(4) Law Rep. 8 C. P. 227.

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erroneous. The defence was not, in my judgment, a reasonable defence. It was without any foundation in law, and there was no authority from the defendants, either express or implied, to set it up.

This, however, does not dispose of the whole of the plaintiffs' claim. For it may be said "True, the defence was ill-advised and unauthorized; still the plaintiffs were obliged to do something to ascertain their liability, and they at least are entitled to such an amount of costs as they would have incurred had they allowed judgment to go by default, upon a writ of inquiry. But I think this contention fails also, because it seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not in any sense the natural and proximate result of the defendants' breach of duty. The judgment, therefore, must be reversed. It appears to have proceeded wholly upon the case of *Mors le Blanch* v. *Wilson* (1), which is certainly very like this case, and which, if necessary, should in my opinion be overruled.

KEATING, J. I am of the same opinion. I think the damages here sought to be recovered are too remote. The contract between Harding and the plaintiffs is wholly separate from that between the plaintiffs and defendants, and any costs incurred by the plaintiffs in defending an action by Harding on his contract cannot be regarded as the natural and proximate result of the defendants' breach of duty. A different question might have arisen supposing the defendants had requested the plaintiffs to defend, for in that case these costs might, according to the principles which govern actions for money paid, and which will be found in the note to *Lampleigh* v. *Brathwait* (2), have been recovered as money paid by the plaintiffs for the defendants at their request.

If the question here were whether the defence was reasonable or not, I must say that I think it was entirely unreasonable. But this would not dispose of the whole claim. For it might be asked, what were the plaintiffs to do? It has been suggested that they should have let judgment go by default, but that would touch the question of amount only, not of liability.

(1) Law Rep. 8 C. P. 227.

(2) 1 Sm. L. C. 6th ed. at p. 142.

In *Mors le Blanch* v. *Wilson* (1) it was left to the jury in a very similar case to the present to say whether the plaintiff had adopted a reasonable course or not in defending an action for damage brought against him. I believe that in the opinion of my Brother Lush that case is distinguishable from this one; but I feel great difficulty myself in seeing any distinction. I think, therefore, that in the Court below Mr. Williams had a right to rely upon that case as authoritative, but I confess that the decision does not appear to me to be satisfactory. The ground of my present decision is, that the costs claimed are not the proximate consequence of the defendants' breach of duty.

LUSH, J. I am of the same opinion; and my judgment proceeds upon the ground that the costs claimed are not the natural consequence of the defendants' breach of contract, nor were they incurred at their request or for their benefit. There were two separate contracts; one between Harding and the plaintiffs, and the other between the plaintiffs and the defendants. The defendants knew of no one but the plaintiffs in the matter; and it might well have been that the plaintiffs were liable to Harding on their contract, and yet that the defendants were not liable to the plaintiffs on theirs, or vice versâ. Upon the action by Harding being commenced, the plaintiffs informed the defendants, who, on the 15th of December, replied that they were protected by the Carriers Act, and that they would have nothing to do with the defence of the action. This position they continued to maintain. The plaintiffs nevertheless defended Harding's action, but without success, and now claim their costs from the defendants as well as the damages (650*l.*) which they had to pay Harding.

Now it should be observed, that the plaintiffs might have sued the defendants at once, when the measure of the defendants' liability would have been the injury to the pictures. The defendants' neglect was in not carrying the goods safely, and the plaintiffs, though themselves protected by their contract with Harding, might still have recovered against them. This, then, is not as the Court below appear to have thought, a case "in which a person incurs a liability in consequence of the neglect or default of another in

(1) Law Rep. 8 C. P. 227.

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some duty owing to him." The defendants incurred no liability to Harding, and their liability to the plaintiffs was quite apart from any liability of the plaintiffs to Harding. The costs of defending Harding's action therefore cannot be said to be the consequence of the defendants' default. The two things have no connection whatever with each other.

But the Court below also place their judgment upon the ground that it was reasonable that the plaintiffs should have the damages assessed in Harding's action. It may have been reasonable for their own benefit; but as the defendants could not be bound by the assessment, I do not see how it could be for theirs.

Again, we have been pressed with the difficulty in which the plaintiffs were placed; but as to that the difficulty arises from the nature and magnitude of their business, and ought not to influence our decision upon the question before us. It remains to add a few words with regard to *Mors le Blanch* v. *Wilson* (1), upon which it appears that the Court below acted. In my opinion there is no analogy between the two cases. In that case the amount of demurrage ascertained in the first action would necessarily be the measure of damages in the second; and, moreover, there the jury expressly found that the plaintiff had adopted a reasonable course in defending the first action. I think, therefore, that our decision in this case is not really in conflict with that of the Court of Common Pleas.

QUAIN, J. If this were a contract of indemnity where, although there may be two contracts in form, there is only one in substance, our decision might be in favour of the plaintiffs. In such a case, a surety who is called upon to pay the debt due or duty owing from the principal may well be justified in defending an action at the principal's expense. The cases which have been referred to, with one exception, are all cases of indemnity, and really have no application here. For we have to deal with two separate and independent contracts, and it would, it seems to me, be very unreasonable to hold that the plaintiffs should be able to charge the defendants against their will and without their sanction with the costs of an action brought upon a contract made by the plaintiffs

(1) Law Rep. 8 C. P. 227.

with Harding, to which the defendants were no parties and with which they had no concern whatever.

This case, then, is not one of principal and surety; and the only ground on which the plaintiffs can recover these costs is, that the costs are the natural and reasonable consequence of the defendants' breach of contract, and therefore within the well-known rule laid down in *Hadley* v. *Baxendale*. (1) But I am clearly of opinion that they cannot be so considered. If the defendants had chosen to undertake the defence, then no doubt an action for money paid would have been maintainable upon the principle of the cases cited in the note to *Lampleigh* v. *Brathwait*. (2) But the evidence here is that, from first to last the defendants refused to have anything to do with Harding's action.

With regard to *Mors le Blanch* v. *Wilson* (3), that is, I think, an authority for the plaintiffs. I am unable to distinguish it from this case. There, as here, there were two separate and independent contracts; and I do not think, with deference to my Brother Lush, that the assessment of damages against Mors le Blanch was conclusive in his action against Wilson. But sitting here we are not bound by that case, which appears to have proceeded upon a mere dictum of Parke, B., in *Tindal* v. *Bell*. (4) I agree with my Lord and my Brother Keating in thinking it wrongly decided.

ARCHIBALD, J. I am of the same opinion. These costs cannot be claimed by reason of the defendants having given any actual authority to incur them. Nor were the plaintiffs compelled to incur them by reason of the defendants' default. In other words, they were not the natural and necessary consequence of that default. The contracts were wholly independent, and the damages recovered against the plaintiffs by Harding were not of necessity the same as those which the plaintiffs could recover against the defendants. The assessment in the first action could not in any shape be conclusive against the defendants.

(1) 9 Ex. 341; 22 L. J. (Ex.) 179.
(2) 1 Sm. L. C. 6th ed. at p. 142.
(3) Law Rep. 8 C. P. 227.
(4) 11 M. & W. at p. 231.

(1) SC 18 Jur. 358.

1874

BAXENDALE v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

With regard to *Mors le Blanch* v. *Wilson* (1), I cannot see any distinction between it and the present case. My Brother Lush has pointed out what he considers to be a distinction; but I cannot see why, in that case, the damages assessed against Mors le Blanch furnished a conclusive test of those which he could recover against Wilson. There, as here, the contracts were separate and independent, and Mors le Blanch might have sued Wilson before he had been sued himself, and so have settled the question of demurrage, just as here the plaintiffs might at once have sued the defendants. If, therefore, it be necessary to pronounce an opinion as to *Mors le Blanch* v. *Wilson* (1), I should hold it open to the same objection as the decision of the Court below in this case.

Judgment reversed.

Attorneys for plaintiffs: *Upton, Johnson, & Co.*
Attorney for defendants: *T. C. Church.*

(1) Law Rep. 8 C. P. 227.

END OF MICHAELMAS TERM, 1874.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXVIII VICTORIA.

ARMSTRONG *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

1875
Jan. 23.

Negligence—Collision between Railway Carriages—Identification of Passenger with his Driver—Joint Wrong-doers.

The plaintiff, one of the travelling inspectors of the carriage and waggon department of the L. and N. W. Railway Company, was travelling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. Station, and on the line of the defendants, over which the L. and N. W. Railway had running powers, the train in which the plaintiff was travelling came into collision with a number of loaded waggons which were being shunted from a siding by the defendants, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train in travelling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by the defendants.

The jury found that the accident was caused by the joint negligence of the defendants and the L. and N. W. Railway Company :—

Held, approving of the decision in *Thorogood* v. *Bryan* (8 C. B. 115), that the plaintiff was so far identified with the L. and N. W. Railway Company that he could not recover :

Semble, that the evidence did not support the finding of the jury with regard to the defendants, but shewed that the L. and N. W. Railway were solely responsible for the accident.

DECLARATION that plaintiff was lawfully travelling in a train of carriages drawn by a locomotive engine lawfully being and

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running on a railway of the defendants, and the defendants so negligently conducted themselves in the control and management of their railway, and in keeping the same in proper order and condition, that the train of carriages in which the plaintiff was then travelling ran into and came into collision with a train of waggons and trucks of the defendants then standing and being on the railway, whereby the plaintiff was injured, &c.

Plea: not guilty. Joinder of issue.

At the trial before Archibald, J., at the Manchester Summer Assizes, 1874, it was proved that the plaintiff, one of the travelling inspectors of the carriage and waggon department of the London and North Western Railway Company, was in August, 1873, travelling under a pass from them in one of their trains from Leeds to Manchester. This train had to pass Clayton Bridge Station, which is on a branch of the defendants' railway, over which branch the London and North Western have running powers. Upon arriving at the station the train ran against some coal waggons which were being shunted from a siding by the defendants, and the plaintiff was seriously injured. There was evidence that the collision was owing to the driver of the train approaching Clayton Bridge distant-signal, on a hazy day and when the rails were slippery, at so high a speed that he was unable to stop when he came in sight of the distant-signal, which had been placed at danger by the defendants. He stated, however, that owing to the weather being hazy he was unable to see the signal until it was too late. The jury found that the collision was caused by the joint negligence of the London and North Western Company and of the defendants, and assessed the damages at 400*l.* The learned judge directed a verdict for the defendants, with leave for the plaintiff to move.

A rule having been obtained accordingly, to enter the verdict for the plaintiff, upon the ground that upon the facts as proved and found by the jury, the judge was wrong in directing the verdict to be entered for the defendants,

Herschell, Q.C., and *Crompton* shewed cause. The learned judge was right in directing the verdict to be entered for the defendants. *Thorogood* v. *Bryan* (1) is in point. There the plaintiff, a pas-

(1) 8 C. B. 115; 18 L. J. (C.P.) 336.

senger by an omnibus, was run over by a second omnibus, of which the defendant was owner, and it was held that if the jury thought that want of care in the driver of the plaintiff's omnibus conduced to the accident, their verdict must be for the defendant, for the plaintiff must be taken to be identified with the driver of the omnibus in which he was passenger; and in the previous case of *Bridge* v. *Grand Junction Ry. Co.* (1) the Court of Exchequer appear to have held a similar opinion, in a case where a collision had taken place between two railway trains. *Thorogood* v. *Bryan* (2) has never been overruled. It is true that in *The Milan* (3), a proceeding by the owner of cargo in a brig against a steamer with which the brig came into collision, Dr. Lushington declined to be bound by *Thorogood* v. *Bryan* (2), and said that he disapproved of it. But the learned judge practically followed the decision, for, considering that both ships were in fault, he directed the steamer to pay, according to Admiralty practice, half the damage to the plaintiff, and thereby he identified the owner of the cargo with the owner of the ship in which it was carried. At common law the passenger is identified with the carrier. In *The Milan* (3) the owner of the cargo is identified with the shipowner. *Thorogood* v. *Bryan* (2) is also criticised in the note to *Ashby* v. *White*. (4) But a mere opinion ought not to avail against a decision which has always been followed.

[BRAMWELL, B. There might be a case in which a person was unable to get out of the way of two omnibuses owing to the misconduct of the drivers. He might sue either, but I think he would have to allege that the accident was caused by the negligence of the defendant and the driver of another omnibus.]

In *Waite* v. *North Eastern Ry. Co.* (5), where a child was injured partly by the negligence of its grandmother, in whose care it was, and partly by the negligence of the company, Williams, J., expresses his opinion that there was an identification between the child and the person in charge of it, and evidently treats *Thorogood* v. *Bryan* (2) as settled law. Secondly, the finding of the jury

(1) 3 M. & W. 244.
(2) 8 C. B. 115; 18 L. J. (C.P.) 336.
(3) Lush. Adm. 388; 31 L. J. (P. M. & A.) 105.
(4) 1 Sm. L. C. at p. 266, 6th ed.
(5) E. B. & E. 719; 28 L. J. (Q.B.) 258.

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is not consistent with the facts proved at the trial. Admitting that the defendants might be liable to the plaintiff for some misfeasance on their part, they cannot be liable for a mere non-feasance in leaving some waggons on their line, which would have caused no harm, but for the carelessness of the London and North-Western train in not observing the danger signal. If there had been due care on the part of the London and North-Western the accident would never have happened. The jury say that the defendants were guilty of negligence, but they merely gave an opportunity to some one else to be negligent. [They also referred to *Davies* v. *Mann* (1); *Rigby* v. *Hewitt* (2); *Wright* v. *Midland Ry. Co.* (3)]

Pope, Q.C., and *G. B. Hughes*, in support of the rule. The plaintiff is entitled to the verdict. In the first place, *Thorogood* v. *Bryan* (4), assuming it to be rightly decided, is distinguishable. There there was contributory negligence on the part of the plaintiff himself in getting out of the omnibus in the middle of the road, instead of at the kerb. But the soundness of the decision has always been questioned. The statement that the passenger is "identified" with the driver is surely inaccurate. Where is this identification to stop? Why may not the passenger be liable in an action for the driver's negligence?

[POLLOCK, B. The identification does not involve any volition on the part of the passenger. It merely means that he has equal rights with the driver.]

Besides the doubts expressed by Dr. Lushington in *The Milan* (5), and by the editors of Smith's Leading Cases in *Ashby* v. *White* (6), Williams, J., in *Tuff* v. *Warman* (7), speaks of the case as having been criticised, and the fact is also mentioned in Manley Smith on Master and Servant, 3rd ed. p. 281. In America, it appears from Shearman and Redfield on Negligence, 2nd ed. p. 53, s. 46, to be held that where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plain-

(1) 10 M. & W. 546.
(2) 5 Ex. 240; 19 L. J. (Ex.) 291.
(3) Law Rep. 8 Ex. 137.
(4) 8 C. B. 115; 18 L. J. (C.P.) 336.
(5) Lush. Adm. 388; 31 L. J. (P. M. & A.) 105.
(6) 1 Sm. L. C. at p. 266, 6th ed.
(7) 2 C. B. (N.S.) at p. 750; 26 L. J. (C.P.) 265.

tiff's control, or that he controlled the plaintiff's personal conduct: and the cases of *Eaton* v. *Boston and Lowell Ry. Co.* (1), and *Webster* v. *Hudson River Ry. Co.* (2), are referred to, which fully support the proposition. Where the driver is the plaintiff's servant or agent, there may be no remedy. But in the case of a railway train, omnibus, or public conveyance, the passenger has no voice in the selection of the driver.

BRAMWELL, B. I think this rule must be discharged. It is impossible to distinguish the case from *Thorogood* v. *Bryan* (3), except in one particular, which is in the defendants' favour. It must not be supposed, so far as my opinion is of any value, that I am at all dissatisfied with *Thorogood* v. *Bryan.* (3) Mr. Pope admits that if his contention is right, the owner of a bale of goods carried by the defendants, and damaged by an accident similar to this, would be entitled to maintain an action, also that if a carriage had been lent by the owner, and injured by the joint negligence of the driver and a third person, the owner could sue such person for the damage. It seems to me that these are startling propositions. Then there is another difficulty. If this action is maintainable, in what sense are the defendants joint wrong-doers with the London and North Western Company? Can there be a joint liability with regard to the negligence, or breach of duty to the plaintiff, and no joint liability with regard to the contract under which he was carried as passenger? Could another action be maintained by the plaintiff against the London and North Western Company? Suppose the plaintiff had been merely an ordinary passenger, could he first of all maintain an action against the London and North Western Company, which carried him, for breach of contract, and then another action against the Lancashire and Yorkshire Company, by whose negligence the coal waggons were left on the line? These are questions worthy of consideration. But in the present case there seems to be good reason why the rule in *Thorogood* v. *Bryan* (3) should apply. The plaintiff cannot maintain an action against the London and North

(1) 11 Allen, Rep. 500. (2) 38 New York Rep. 260.
(3) 8 C. B. 115; 18 L. J. (C.P.) 336.

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Western Company, because he was their servant, and yet it is said that he may maintain an action against another company who only contributed to the mischief, and were certainly not the proximate cause of it. It must follow, therefore, that while the servant of a railway company, in case of a collision, may sue what I may call the opposing company, he cannot sue the company who are the proximate cause of his injury. But I am prepared to decide this case on the authority of *Thorogood* v. *Bryan* (1), which has never been overruled. As I have said, I think it is distinguishable from this case in a point favourable to the defendants. And I think that upon this rule the defendants may avail themselves of the evidence at the trial, without being concluded by the finding, and although they have no cross rule. In assenting to the leave to move, the counsel for the defendant does not adopt the proceedings except so far as there is evidence to support them. The question whether there was evidence of negligence by the defendants must be considered to have been left open, and I think it might be put in this way:—The defendants were possibly guilty of negligence, but was it negligence the consequences of which might have been avoided with reasonable care? It seems to me that upon the evidence the defendants might have brought an action for any damage sustained by their carriages against the London and North Western Company, and *Davies* v. *Mann* (2) would be an authority in favour of the action.

POLLOCK, B. I also think the rule ought to be discharged. It is sufficient to say that the case is not distinguishable from *Thorogood* v. *Bryan* (1), though it must not be supposed that I am dissatisfied with that decision. The only difficulty in it arises from the use of the word "identified" in the judgment. If it is to be taken that by the word "identified" is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition, which could not be entirely sustained. But what I understand it to mean is, that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver. This is

(1) 8 C. B. 115; 18 L. J. (C.P.) 336. (2) 10 M. & W. 546.

illustrated by the case of *Waite* v. *North Eastern Ry. Co.* (1), where it was held that a child, with regard to contributory negligence, was identified with its grandmother who accompanied it, though it was impossible to say that there was any selection of the companion, or any act of volition on the part of the child. Then, if the rule laid down by Parke, B., in *Bridge* v. *Grand Junction Ry. Co.* (2), "that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover," be adhered to, it does not seem to me that there is any very great hardship on the plaintiff. He is in the same position as if he had been the animal injured in *Davies* v. *Mann.* (3) He is entitled, notwithstanding the negligence of the driver of his own train, to recover against the defendants if they have been guilty of any such negligence as was proved in *Davies* v. *Mann.* (3) It may be said, why should he not have a right of action against both companies? The answer is, he may have such an action against two tortfeasors, but there is no hardship in saying that if two independent persons are in a position somewhat hostile to each other, then the right to maintain a separate action against one may be an answer to an action brought against the other, for the plaintiff has to shew that the negligence of the person whom he sues is the proximate cause of the accident.

Rule discharged.

Attorneys for plaintiff: *W. A. Holcombe, for T. E. Jones, Manchester.*

Attorneys for defendants: *Clarke, Woodcock, & Ryland, for T. A. & J. Grundy & Co., Manchester.*

(1) E. B. & E. 719; 28 L. J. (Q.B.) 258.

(2) 3 M. & W. 244, at p. 248.

(3) 10 M. & W. 546.

1875

Jan. 29.

HEMMING *v.* BATCHELOR.

Practice—Death of Plaintiff after Nonsuit—Abatement of Action—Right of Defendant to enter Judgment nunc pro tunc—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 139—*Rule* 56 *of Hilary Term*, 1853.

In an action against the defendant for negligently allowing an area to remain open in a highway, whereby the plaintiff (an infant, suing by next friend), was injured, the case was tried after term, and a nonsuit directed, on the ground that there was no evidence of negligence; the judge staying execution to enable the plaintiff to move to set aside the nonsuit. During the vacation the plaintiff died. In the following term, the plaintiff's next friend obtained a rule nisi to set aside the nonsuit, on the ground that there was evidence of negligence, and the defendant a rule nisi to tax his costs, or why the Court should not allow judgment to be signed for him nunc pro tunc :—

Held, that the action having abated by the plaintiff's death, a motion to set aside the nonsuit could not be entertained. As however the judge by staying execution had intimated that he regarded the question as to the defendant's liability a doubtful one, judgment nunc pro tunc ought not to be entered for the defendant. The defendant's rule must be discharged, without costs, and the plaintiff's rule allowed to drop.

Declaration by plaintiff (an infant, suing by next friend) against the defendant, for negligently allowing an area or cellar in his possession, under a highway, to be open, whereby the plaintiff fell in and was injured.

Plea, not guilty. Joinder of issue.

At the trial before Pollock, B., at the Middlesex sittings after Trinity Term, 1874, the learned judge expressed his opinion that there was no evidence of negligence for the jury, and (the defendant having refused to consent to leave being reserved to the plaintiff to move to enter the verdict in his favour), he nonsuited the plaintiff, but stayed execution till the fifth day of Michaelmas Term, to enable the plaintiff to move to set aside the nonsuit, or for a new trial.

In the Long Vacation the plaintiff died. In Michaelmas Term, application was made for a rule for the defendant to shew cause why the nonsuit should not be set aside or a new trial had. The Court refused to grant any rule ; but said that if it should become necessary to move to set aside the nonsuit from the defendant proceeding to tax his costs as against the plaintiff's next friend, they would hear the motion, as if it were made on the first occasion.

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At the end of the term, the defendant gave notice of taxation of his costs of the nonsuit. The master declined to tax without a judge's order, and such an order was refused by Pollock, B. The defendant then obtained a rule for the plaintiff to shew cause why the master should not tax the defendant's costs, or why the Court should not allow judgment for the defendant to be signed nunc pro tunc, and the plaintiff obtained a rule nisi to set aside the nonsuit, on the ground that there was evidence of negligence for the jury. The two rules were argued together.

McIntyre, Q.C., and *Reid*, now shewed cause against the plaintiff's rule, and argued, first, that there was not sufficient evidence of negligence on the part of the defendant. [It is unnecessary to refer to this part of the argument.] Secondly, assuming that there was sufficient evidence, the action, being for an injury affecting the plaintiff personally, abated by his death, and the right given by the Common Law Procedure Act, 1852, to the representative of a deceased plaintiff to enter a suggestion and continue the action, only applies to cases where the action would, before the statute, have survived: *Flinn* v. *Perkins*. (1) It is true that this is not a motion to enter a suggestion, as in that case, but it is a motion for a new trial with the object of continuing the action; and the same reasoning applies. Even if such a motion could be made, the next friend is not the personal representative of the infant. It is true that in *Freeman* v. *Rosher* (2), where there was a verdict for the plaintiff with leave for the defendant to move to enter a verdict, and the defendant died after the trial and before the next term, a motion to enter the verdict was allowed to be made, without putting the executors of the defendant on the record or making them parties to the rule, but that must have been on the ground that the leave reserved was equivalent to a consent that the action should survive. Again, the plaintiff was here nonsuited at the trial, and judgment would have been signed by the defendant, but for the stay of execution. The delay was, therefore, the act of the Court, and judgment ought to be entered for the defendant nunc pro tunc, according to rule 56 of Hilary Term, 1853.

Cole, Q.C., and *Cowie*, in support of this rule.

(1) 32 L. J. (Q.B.) 10.

(2) 13 Q. B. 780; 18 L. J. (Q.B.) 340.

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[THE COURT intimated that they would hear the argument on both rules before giving judgment.]

Sect. 139 of the Common Law Procedure Act, 1852, which enacts that the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict, is in the words of 17 Car. 2, c. 8, s. 1, and it was held that that section did not apply to cases of nonsuit: *Dowbiggin* v. *Harrison*. (1) The defendant will, no doubt, rely on the case of *Moor* v. *Roberts* (2), where the plaintiff having died in the interval between the trial (where a verdict had been directed in his favour, with leave for the defendants to move) and a rule being made absolute for a nonsuit, the Court ordered judgment to be entered nunc pro tunc.

[POLLOCK, B. Does that case decide more than that the Court thought that they had a power to enter judgment nunc pro tunc under the particular circumstances?]

The Court has a discretion, and it is submitted that this is a case in which it will not interfere.

[They were then stopped.]

McIntyre, Q.C., and *Reid*, in support of their rule. The defendant is entitled to have judgment entered nunc pro tunc. It is clear that the nonsuit must stand, and this being so, the stay of execution, the act of the Court, was all that prevented the defendant from signing judgment in fourteen days. Where the defendant died pending the argument on a point reserved, on which judgment of nonsuit was afterwards given, the Court ordered the judgment to be entered up of the term next after the trial, in order that his representatives might have the costs of the nonsuit: *Toulmin* v. *Anderson*. (3)

[KELLY, C.B. We are prepared to hold at once, that we have no power to grant a new trial. Is there any Act which compels us to allow the defendant to enter judgment nunc pro tunc?]

The case of *Moor* v. *Roberts* (2) is in favour of the defendant's rule being made absolute.

(1) 10 B. & C. 480.

(2) 3 C. B. (N.S.) 844; 27 L. J. (C.P.) 161.

(3) 1 Taunt. 384.

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KELLY, C.B. In this case we are called upon to exercise our discretion in a matter of considerable importance. The plaintiff, an infant, brought an action against the defendant, and this action was one of the class to which the rule "actio personalis moritur cum personâ" applies. The action proceeded to trial, and at the close of the plaintiff's case the learned judge directed a nonsuit, and was desirous of putting the case in such a shape as might be most convenient for an appeal. This desire was counteracted by the defendant's refusal to leave being reserved to the plaintiff to move to enter the verdict in his favour; but at the same time we must assume that the learned judge had some doubt as to whether the nonsuit was in accordance with the law, for he stayed execution till the fifth day of Michaelmas Term, to enable the plaintiff to move for a new trial. In the interval the plaintiff died. At the beginning of term an application was made for a rule nisi to set aside the nonsuit, and a rule nisi would no doubt have been granted but for the plaintiff's death; but owing to this obstacle the Court merely gave the plaintiff's next friend permission to move, in case it should be necessary. The defendant afterwards applied to Pollock, B., in Chambers, for an order to tax his costs; but the learned Baron refused to make any such order. The defendant then waited till the last day of term, when the time for moving to set aside the nonsuit had elapsed, and then moved to rescind the order of Pollock, B., and for power to sign judgment nunc pro tunc. Now, with regard to this application, it is clear that to ask us to enter judgment nunc pro tunc is to ask us to enter it as of a date when the learned judge who tried the case expressly refused to allow it to be entered. The question therefore is, are there any precedents for entering judgment nunc pro tunc where the judge who tried the case was himself of opinion that the judgment ought not to be entered. Now there is neither Act of Parliament, regulation, nor settled practice which compels the Court to make such an order under circumstances like the present. There are cases, no doubt, where a decision upon the merits has been obtained, and where, owing to the death of one of the parties, effect cannot be given to this decision without the intervention of the Court. But the principle of those cases cannot apply where the learned judge has expressly withheld from the defendant the power to sign judg-

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ment; for if it were otherwise, we should overrule what is equivalent to an opinion that no judgment ought to be signed until the decision of the full Court had been obtained. [After referring to the evidence of negligence, the Lord Chief Baron said:] It is unnecessary to express any opinion as to the defendant's liability; but having regard to our decision on the defendant's application, I think the plaintiff's rule may be allowed to drop.

POLLOCK, B. I am of the same opinion. By rule 56 of Hilary Term, 1853, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the Court or a judge to order a judgment to be entered nunc pro tunc." I refer to this rule for the purpose of drawing attention to the word "competent." This word is explained by what was the practice before any such rule of court existed. It was then the practice of the courts, if either party died pending the time taken for argument on a motion in arrest of judgment or for a new trial, to enter judgment as of the term in which judgment would otherwise have been given. This judgment nunc pro tunc was a fiction of which the Courts availed themselves for the purpose of aiding the party whom they thought entitled to judgment. Now here, after the plaintiff's case was closed, I, at the request of the defendant, directed a nonsuit; but I should certainly require more time for consideration before I decided whether the nonsuit should stand. The rule of court as to the entry of judgment does not, therefore, apply to the present case. With regard to the plaintiff's rule, it is perfectly clear that there cannot be a new trial, and that there is no authority for our granting it. I think that, under these circumstances, that rule may be allowed to drop.

AMPHLETT, B. I am of the same opinion. As soon as the position of the case was explained to me, I felt that it was impossible but that some way existed of avoiding so great an injustice as compelling the plantiff's next friend to pay the costs of this action. The learned judge at the trial stayed execution because he thought the liability of the defendant a subject fit for discussion, and this

discussion cannot now take place because of the death of the person injured. Under these circumstances I think the defendant cannot ask us, where the matter is in our discretion, to assist him. I do not think it necessary to add anything upon the subject of the plaintiff's rule, which cannot possibly be made absolute, and which I think may well be allowed to drop.

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Plaintiff's rule allowed to drop; defendant's rule discharged without costs.

Attorneys for plaintiff: *Dangerfield & Blythe.*
Attorneys for defendant: *Nash, Field, & Co.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 8.

HOLKER *v.* PORRITT.

Easement—Water—Natural and Artificial Stream—Riparian Owner.

A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell; the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface, and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood, and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867 he conveyed the mill, with all water rights, to the plaintiff.

In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of the water:—

Held (affirming the judgment of the Court below), that the plaintiff was entitled to maintain the action.

APPEAL from the judgment of the Court of Exchequer discharging a rule obtained by the defendant to enter the verdict for him. (1)

The facts of the case were as follows:—From time immemorial two streams flowing down to a deep open valley called Buckden Ginnell, there joined, and the united stream was carried along an artificial embankment across Buckden Ginnell into the Broadwood Edge estate, and flowed to a point in Broadwood Edge Farm,

(1) Reported Law Rep. 8 Ex. 107.

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marked E. on the plan used at the trial. There it was divided by a stone or feather, which had existed as far back as any of the witnesses remembered, and as to the origin of which there was no evidence. Part of the divided stream flowed down into Buckden Brook, and thence into the River Irwell; the other part flowed to a watering trough in Silas Wilson's farm, which formed part of the Lumn Hall estate. The water which flowed to the watering trough was formerly used for cattle and for domestic purposes, and the residue overflowed the trough, became diffused over the surface, and discharged itself by percolation through the soil.

In 1845 a Mr. Walker became owner of the Lumn Hall estate, which extended from Broadwood Edge to the River Irwell, and which was copyhold of the manor of Tottington, in the Salford division of the county of Lancaster. The estate comprised a cotton mill, situated on the banks of the Irwell, about half a mile distant from Silas Wilson's farm; this mill Walker proceeded to alter into a paper mill, and for the purpose of supplying it with water he constructed lodges or reservoirs adjacent to the mill, which, in 1846 and 1847, he connected with the watering trough on Silas Wilson's farm.

In 1865 Walker purchased the Broadwood Edge estate, which was also copyhold of Tottington Manor.

In 1867 he conveyed to the plaintiff the paper mill, with the lodges and reservoirs, and with power to enter on the Lumn Hall and Broadwood Edge estates to repair and construct weirs and goits, and also the full and free use and enjoyment of all springs, wells, and streams of water in, under, upon, or arising or issuing in or from any part of the Lumn Hall and Broadwood Edge estates. The land so conveyed was, at the nearest point, 400 yards distant from Silas Wilson's farm.

The defendants were owners of land traversed by the two streams which united in Buckden Ginnell, and the action was brought to recover damages for an obstruction by them of these two streams.

At the trial of the cause before Willes, J., at the Manchester Summer Assizes, 1872, an obstruction was admitted, and a verdict was entered for the plaintiff by consent, with 40*s.* damages, with leave to the defendants to move to enter a nonsuit or a

verdict for them, if the plaintiff was not entitled to maintain this action.

A rule having been obtained and afterwards discharged (1), the defendants appealed.

Nov. 29, 30, 1874. *Herschell, Q.C.* (*Pope, Q.C.*, and *Baylis* with him), argued for the defendants.

Holker, S.G. (*Kemplay, Q.C.*, and *Gorst*, with him), for the plaintiff.

The following authorities were referred to:—*Laing* v. *Whaley* (2); *Stockport Waterworks Company* v. *Potter* (3); *Hodgkinson* v. *Ennor* (4); *Sampson* v. *Hoddinott* (5); *Nuttall* v. *Bracewell* (6); *Miner* v. *Gilmour* (7); *Mason* v. *Hill* (8); *Dickinson* v. *Grand Junction Canal* (9); *Acton* v. *Blundell* (10); *Dudden* v. *Clutton Union* (11); *Chasemore* v. *Richards* (12); *Webb* v. *Bird* (13); *Wood* v. *Waud* (14); Gale on Easements, 3rd ed. pp. 5, 102, 244, &c.; Angell on Watercourses, pp. 157, 158.

Cur. adv. vult.

Feb. 8, 1875. The judgment of the Court (Lord Coleridge, C.J., Keating, Lush, Quain, and Archibald, JJ.), was delivered by

LUSH, J. Upon the hearing of this appeal before us at the sittings after the last term, two questions were principally argued, first, whether the conveyance of the surplus water by means of the drain from the watering trough to the mill is to be considered as a prolongation of the stream entitling the mill-owner to the ordinary riparian rights thereon; and, secondly, if not, whether by the enjoyment without interruption for more than twenty years, first by Walker and afterwards by the plaintiff, the latter had

(1) Law Rep. 8 Ex. 107.

(2) 3 H. & N. 675; 5 H. N. 480; 26 L. J. (Ex.) 327; 27 L. J. (Ex.) 422.

(3) 3 H. & C. 300.

(4) 4 B. & S. 229; 32 L. J. (Q.B.) 231.

(5) 1 C. B. (N.S.) 590; 26 L. J. (C.P.) 148.

(6) Law Rep. 2 Ex. 1.

(7) 12 Moo. P. C. 131.

(8) 3 B. & Ad. 304; 5 B. & Ad. 1.

(9) 7 Ex. 282; 21 L. J. (Ex.) 241.

(10) 12 M. & W. 324.

(11) 1 H. & N. 627; 26 L. J. (Ex.) 146.

(12) 7 H. L. C. 349.

(13) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841; 30 L. J. (C.P.) 384; 31 L. J. (C.P.) 335.

(14) 3 Ex. 748; 18 L. J. (Ex.) 305.

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acquired a right to the water as an easement by virtue of the Prescription Act.

Upon consideration of the peculiar facts of this case, we think that the plaintiff's title rests on a broader ground, and that he need not resort either to the theory of an extension of the stream or to the Prescription Act. It must be taken, upon the facts stated, that the owner of Silas Wilson's Farm had a prescriptive right to the maintenance of the stone or feather at the point E., and of the diversion by means of it of part of the stream to and for the exclusive use of the farm. The water which came down to him at the farm was his own to use it as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use which he chose to make of it there. In this respect his position was different from that of a riparian owner, who only shares the use of the water in common with other riparian owners. In collecting the overflow at the trough and conveying it to the mill, he clearly did nothing in derogation of the rights of any other person, or which he was not entitled to do in the lawful use and enjoyment of his own property. Nor did he thereby lose any right which he then before had. While the water overflowed the trough and ran to waste, he had a right to complain of any undue diversion or obstruction of the stream which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill. No doubt the consequences to a wrong-doer became more serious after the drain was made than they were before, because the wrongful act was more injurious, and larger damages would have to be paid for it; but it is a fallacy to say that a man's rights are abridged if, when he abuses them, he has to make larger compensation. It is the necessary effect of every appropriation of running water to a new and more beneficial use that a wrongful diversion or abstraction entails a larger measure of liability. It is established by many authorities, which are collected in and confirmed by *Mason* v. *Hill* (1), that as soon as the owner of land on a stream has appropriated the water to a beneficial use he may sue for the injury done to him in respect of such new use. In that case the proprietor having appropriated the stream to the use of a mill

(1) 5 B. & Ad. 1.

newly erected, was held entitled to recover from a proprietor higher up the stream damages for the injury to his mill occasioned by the wrongful diversion of the stream, although before the mill was built the wrong-doer would only have been liable to nominal damages.

If, therefore, Walker had been in possession of the mill in question, it is clear to us that he could have brought this action, not because he happened to be at the same time riparian owner higher up than the mill and also owner of the mill, but simply as owner of the mill. And there is no conceivable reason why the plaintiff should not have the same right, inasmuch as he is surrenderee of the mill with all the water rights annexed, and which had become appurtenant to it. Walker had chosen to create a servitude on his own land, but none has been created, or been attempted to be created, on the lands or riparian rights of the defendants.

None of the authorities cited conflict in the least degree with this view. In the case of *Stockport Waterworks Co.* v. *Potter* (1) the water was taken directly from the stream, in the regular flow of which the proprietors below had an interest; and it is clear that such use of the water could only grow into a right by twenty years' enjoyment. Whether that case was rightly decided or not; whether the grounds upon which the majority decided can be maintained, or whether it is distinguishable from *Nuttall* v. *Bracewell* (2) we need not now consider. The present case stands clear both of the difficulty and the reasoning in that case, and we have no hesitation in holding, for the reasons we have given, that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Milne, Riddle, & Mellor.*

Attorneys for defendants: *Woodcock & Ryland.*

(1) 3 H. & C. 300. (2) Law Rep. 2 Ex. 1.

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Feb. 12.

[IN THE EXCHEQUER CHAMBER.]

LARCHIN *v.* THE NORTH WESTERN DEPOSIT BANK.

Bill of Sale—Sufficiency of Description of Grantor—"Accountant."

The grantor of a bill of sale was described in the affidavit filed under the Bills of Sale Act, as an "accountant." He was in fact a clerk in the accountant's department at the Euston Square Station of the London and North Western Railway Company, but in his leisure time was occasionally employed to balance tradesmen's books :—

Held (affirming the decision of the Court below), an insufficient description.

10 C 627
628-9
4 B D 604
15 Q D 49

APPEAL from the judgment of the Court below, discharging a rule obtained by the plaintiff in an interpleader issue to enter the verdict for him.

At the trial of the issue before Bramwell, B., at the Surrey Summer Assizes, 1872, it appeared that the bill of sale under which the plaintiff claimed was granted by one Samuel Whitehead, who was a clerk in the accountant's department at the Euston Square Station of the London and North Western Railway Company, but also, in his leisure time after office hours, was sometimes employed by tradesmen at Acton, where he resided, to balance their books. In the affidavit filed with the bill of sale under the Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, he was described as an "accountant." The learned judge held the description to be insufficient, and a verdict was entered for the defendants, with leave to the plaintiff to move for a rule to enter the verdict for him, which rule was afterwards obtained, and on argument discharged. (1) The plaintiff appealed.

Talfourd Salter, Q.C., argued for the plaintiff, and cited *Hewer* v. *Coxe* (2); *Briggs* v. *Boss* (3); *Allen* v. *Thompson.* (4)

Prentice, Q.C., for the defendants, was not called on.

BLACKBURN, J. The object of the Act is to give notice to all who are likely to deal with the grantor of the bill of sale; not to

(1) Law Rep. 8 Ex. 80.
(2) 3 E. & E. 428; 30 L. J. (Q.B.) 73.
(3) Law Rep. 3 Q. B. 268.
(4) 1 H. & N. 15; 25 L. J. (Ex.) 249.

6 Jur. N.S. 139
2 Jur. N.S. 457

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enable a person who is curious on the matter to trace him out, but to enable one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale. The description given here would not convey such information, and to allow it to be good would be in effect to strike out of the Act the words which require a description of the grantor's "occupation." In *Briggs* v. *Boss* (1) we went quite as far as we ought to go.

MELLOR, J. I am of the same opinion. In *Briggs* v. *Boss* (1) I thought we went to the very extreme limit, and had considerable hesitation in concurring in that decision, and I certainly will not extend it.

LUSH, GROVE, DENMAN, and ARCHIBALD, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *W. Norris.*
Attorneys for defendants: *Howard & Co.*

GUNNESTAD *v.* PRICE.
FULLMORE *v.* WAIT.

Feb. 12.

County Court—Admiralty Jurisdiction—Demurrage—31 & 32 *Vict. c.* 71—32 & 33 *Vict. c.* 51, *s.* 2—*Construction of Statutes—Costs.*

A claim for demurrage is not within the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, which only gives jurisdiction to county courts to try and determine causes which are within the jurisdiction of the Admiralty Court.

Simpson v. *Blues* (Law Rep. 7 C. P. 290) approved.

Cargo ex Argos (Law Rep. 5 P. C. 134) dissented from.

THESE were two rules calling on the plaintiffs in these actions respectively to shew cause why the allocatur of the master allowing the plaintiff's costs should not in each case be set aside, on the ground that the actions should have been brought in the county court.

In the case of *Gunnestad* v. *Price* the plaintiff was the owner

(1) Law Rep. 3 Q. B. 268.

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of a ship which had been chartered by the defendant. The action was brought upon the charterparty to recover a sum of 95*l.* 6*s.* 3*d.* on account of freight and demurrage. The defendant paid into court a sum of 36*l.* 16*s.* 2*d.*, and defended the action as to the rest of the claim.

The cause was tried in London at the sittings after Hilary Term, 1874, before Kelly, C.B., and a special jury, and a verdict was returned for the plaintiff for 19*l.* 1*s.* 9*d.* beyond the sum paid into court.

On the plaintiff's bill of costs coming before a master for taxation, it was objected, on behalf of the defendant, that, under the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51) s. 2, the action ought to have been brought in the county court, and that the plaintiff was, therefore, by the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 9, not entitled to costs, and was liable for the defendant's costs. (1) The master being of opinion that the case could not have been brought in the county court, held that the plaintiff was entitled to his costs; and, for the purpose of raising the ques-

(1) By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, jurisdiction is given to county courts in certain matters "in this Act referred to as Admiralty causes;" and by s. 9: "If any person shall take in the High Court of Admiralty of England or in any superior court proceedings which he might without agreement have taken in a county court, except by order of the judge of the High Court of Admiralty, or of such superior court, or of a county court having Admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that Admiralty cause is limited by this Act . . . he shall not be entitled to costs, and shall be liable to be condemned in costs unless the judge of the High Court of Admiralty, or of a superior court before whom the cause is tried or heard shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty of England or in a superior court."

By the County Court Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51, which is by s. 1 to be read as one with 31 & 32 Vict. c. 71) it is enacted (s. 2) that "any county court appointed, or to be appointed to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—

"(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.*"

tion, gave his allocatur for a sum agreed upon by the parties at 120*l.*

Subsequently to the taxation of costs, and after a rule nisi had been obtained to review the taxation, the plaintiff applied to and obtained from the learned judge a certificate that the cause was a proper cause to be tried in the superior court.

In the case of *Fullmore* v. *Wait* the action was also for demurrage. The claim in the declaration was for 100*l.* The defendant paid 78*l.* into court, which the plaintiff took out of court in full satisfaction of his claim, and entered a nolle prosequi as to the residue. In this case also, the master having made his allocatur for the plaintiff's costs, a rule was obtained to set aside the order.

Nov. 24, 1874. Against the first of these rules,

Benjamin, Q.C. (*Bigham* with him), shewed cause, and contended that the decision of the Court of Common Pleas in *Simpson* v. *Blues* (1) was right, and should be followed in preference to that of the Privy Council in *Cargo ex Argos.* (2) They also contended that the certificate was in time, and cited *Swift* v. *Jewsbury* (3) and *Lyons* v. *Hyman.* (4)

Field, Q.C., and *Foard*, in support of the rule, contended that this was a claim arising out of an agreement made for the use of the ship, and should have been brought in the county court, and that the certificate having been given after judgment signed, and after the master's allocatur, was not within the competency of the learned judge.

In the second case,

Cohen, Q.C., shewed cause, and contended that it would be a great hardship if the case were held to be within s. 9 of the Act of 1868, as the case not being "tried or heard," there could be no opportunity of asking for a certificate. The 9th section only applies to a case "tried or heard" before a superior court; for, according to the general rule of construction, a section does not apply to a case to which a proviso in the section cannot apply,

(1) Law Rep. 7 C. P. 290.
(2) Law Rep. 5 P. C. 134.
(3) Law Rep. 9 Q. B. 560.
(4) 5 Ex. 749; 20 L. J. (Ex.) 1.

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unless there is something to shew a contrary intention. This point was not brought to the notice of the Court in *Hewitt* v. *Cory*. (1) Upon the question as to jurisdiction, the Court of Common Pleas have, since the decision in *Cargo ex Argos* (2), adhered to their judgment in *Simpson* v. *Blues* (3), and that decision should be followed by this Court.

R. E. Webster, in support of the rule. The second Act was not merely to amend the first one, but "to give jurisdiction in certain maritime causes," which shews the extended scope of the second Act. Leave can always be obtained under the 9th section of the first Act; therefore, payment into court need not deprive the plaintiff of his costs if he takes that precaution. The 3rd section of the first Act gives the definition of Admiralty causes, and such a case as the present is within the definition.

Cur. adv. vult.

Feb. 12. The following judgments were delivered:—

CLEASBY, B. (4) It is unnecessary to state the facts of this case.

The claim is one by the owner of a ship against the charterer for demurrage, and the question raised and argued before us was whether such a claim, being under 300*l.*, could be entertained by the county court by a jurisdiction conferred upon it by the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51).

The County Courts Admiralty Jurisdiction Act, 1868, had first given Admiralty jurisdiction to the county courts, and by the Act of the next year the jurisdiction was extended. The question is, to what extent.

The first Act had only given the county courts jurisdiction to a limited amount in certain matters over which the Court of Admiralty had jurisdiction, and the question becomes, whether the late Act only increased the jurisdiction of the county courts over matters then subject to Admiralty jurisdiction, or created a new Admiralty jurisdiction.

(1) Law Rep. 5 Q. B. 418.
(2) Law Rep. 5 P. C. 134.
(3) Law Rep. 7 C. P. 290.
(4) Kelly, C.B., and Amphlett, B., concurred in this judgment.

The enactment by s. 2 is that any county court appointed to have Admiralty jurisdiction shall have jurisdiction to try the following causes:—"1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship; and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*." Those words, in their natural sense, are no doubt large enough to comprise a claim by shipowners for demurrage which was not at the time the subject of Admiralty jurisdiction at all, and we have to consider whether there is any reason why they should receive a more limited construction so as to exclude such a claim.

If the words were so definite and specific as to apply themselves to an understood subject, they would speak for themselves, and there would be no ground for getting at their proper effect by construction. But if the language is general, and so general that it appears inapplicable without some limitation, then we are entitled to see by the immediate context or the subject-matter to which they are intended to apply, what, if any, limitation ought to be put upon them. Now, the words, in their terms, include causes (that is all causes) as to any claim whatever (whether made by shipowner, charterer, passenger, shipper of goods, consignee, or assignee of bill of lading, or any other person) arising out of any agreement relating to the use or hire of any vessel.

The words are not any agreement *for* the hire of any vessel, but *relating thereto*, and would therefore include an agreement for commission upon obtaining charter, or an agreement to repair, if coupled with an agreement to charter, and a variety of collateral agreements of that nature. The limitations of amount do not in any way limit the character of the claims, and the words may, I think, be regarded as general words, properly limited in their meaning, if there is anything in the context or the nature of the subject to limit them.

The maxim that general words are limited in their applications is constantly acted upon. The maxim itself is that expressed by Bacon (Max. Reg. 10):—"For all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person."

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Where they follow an enumeration of particular things, they do not introduce things of a higher and different character: see *Archbishop of Canterbury's Case* (1); *Casher* v. *Holmes.* (2) In the judgment in *Reg.* v. *Edmundson* (3), Lord Campbell lays down the rule thus:—"The general principle laid down in all the cases which have been cited is, that where particular words are followed by general words, the latter must be construed as ejusdem generis with the former." And in the judgment in *Reg.* v. *Cleworth* (4) the present Lord Chief Justice used the following language:—"Then there is a general expression, 'other person whatsoever'; but, according to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are ejusdem generis."

If, in the present case, instead of the general words in the section standing alone, we had an enumeration of the causes subject to Admiralty jurisdiction similar to what is contained in the third section of 31 & 32 Vict. c. 71, and had then had the general words found in the section in question, I should certainly have thought those general words would have been limited to causes of the same character as those enumerated, viz., causes over which the Court of Admiralty itself had jurisdiction.

As the two Acts are to be read together, and the first gives Admiralty jurisdiction and the second extends it, the particular words in the first may perhaps be regarded as followed by the general words in the second, and so the rule would apply.

But, independent of this, general words are to be limited to the subject-matter, as in the ordinary case of a recital in a deed qualifying general words of release following (not to mention other instances), as *Payler* v. *Homersham* (5); *Simons* v. *Johnson* (6): see note to *Roe* v. *Tranmarr*, Smith's Leading Cases, 6th ed., vol. 2, p. 468.

For example: if, in this case, taking the two Acts to be one, there had been a recital that it was expedient to enlarge the jurisdiction of the county courts, and no more, then the general words of the

(1) 2 Co. Rep. 46 a.
(2) 2 B. & Ad. 592.
(3) 2 E. & E. at p. 83; 28 L. J. (M.C.) 213.
(4) 4 B. & S. at p. 932.
(5) 4 M. & S. 423.
(6) 3 B. & Ad. 175.

enactment would be read by giving the fullest effect to them so as to enlarge that jurisdiction. In that case the subject-matter of legislation would have been simply the enlargement of the jurisdiction of the county courts.

But if the recital of the Act had been, "Whereas it is expedient to transfer to the county courts a portion of the jurisdiction of the Admiralty Court to a limited amount," then I feel satisfied that the words, however general, should be read as only including causes within Admiralty jurisdiction. In that case the subject-matter of legislation would have been Admiralty jurisdiction, and the object would be to make the county courts available for the exercise of it to a limited amount. In arriving at a proper conclusion upon the present question, which is no doubt one of much difficulty from loose legislation, we could not take a safer guide than the recital of the first statute, 31 & 32 Vict. c. 71 (which is to be read as one statute with the second 32 & 33 Vict. c. 51), if there were one. But though there is no formal recital, the first enacting clause may, I think, be regarded as having the same effect in shewing what the subject-matter of legislation was. That clause (s. 2) enacts that, if Her Majesty thinks it expedient, she may give the county courts "Admiralty jurisdiction." What does this mean? The natural meaning of it is to give the county courts jurisdiction possessed by the Court of Admiralty; I can give it no other meaning. There is nothing in that Act to give it any other meaning. The use of the words "Admiralty causes" in that Act afterwards does not do so. Indeed, the difficulty does not arise under that Act of Parliament, but under the second Act, as to which it may no doubt be argued that the language of the second section of the former Act is inapplicable. And if it was clear that the whole of the Admiralty jurisdiction was exhausted by the former Act, and that the second, to have any operation at all, must be applied to new and additional subjects of jurisdiction, I should think the argument almost conclusive. But that is undoubtedly not the case. There are subjects included in the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), which are not included in 31 & 32 Vict. c. 71, and upon which the subsequent statute may take effect.

The question before us has formed the subject of two most able

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judgments in the Court of Common Pleas and the Privy Council, *Simpson* v. *Blues* (1) and *Cargo ex Argos.* (2) It would be impossible to weigh and then correctly balance the strong reasons brought forward in favour of each view. And I have found myself compelled in a case of great difficulty to resort to the simple and well-grounded means of ascertaining what ought to be regarded as the real subject-matter of legislation; and in this way have come to the conclusion that nothing but Admiralty jurisdiction was operated upon.

But I must notice one argument founded upon the 6th section of the first Act, by which the Court of Admiralty may transfer from the county court any Admiralty cause pending there into the Court of Admiralty. This section is no doubt incorporated in the subsequent statute, as was held in *The Swan.* (3) The alternative, then, arises of holding either that the county court only entertains Admiralty causes within the jurisdiction of the Court of Admiralty, or that the Court of Admiralty has indirectly acquired jurisdiction over a new subject-matter. It certainly seems to me that the latter alternative involves a more violent breach of first principles of construction than the former. I only wish further to notice the 6th section of the Admiralty Jurisdiction Act, 1861 (24 & 25 Vict. c. 10), for the purpose of guarding against an argument that the county court has acquired a jurisdiction not possessed by the Court of Admiralty. That section, after giving the High Court of Admiralty a large jurisdiction in claims by owners of any goods carried into any port, adds: "Unless it be shewn to the satisfaction of the Court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." These latter words do not, properly speaking, limit the subject-matter of jurisdiction, but they assume the jurisdiction in the cases provided for, and provide that upon proof to the satisfaction of the Court that the owner is so domiciled, the jurisdiction shall not be exercised. But the Court could only be satisfied by proof given in some cause over which, but for the application of the proviso, it would have jurisdiction. There is nothing, therefore, inconsistent in the county

(1) Law Rep. 7 C. P. 290. (2) Law Rep. 5 P. C. 134.
(3) Law Rep. 3 A. & E. 314.

court, by means of its process under the 3rd section of the Act of 1869, exercising its jurisdiction when the owner is domiciled in England or Wales, though the Court of Admiralty would not do so.

The conclusion is, that the plaintiff proceeded properly in the Superior Court, and is therefore entitled to his costs.

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BRAMWELL, B. I am of opinion in these cases that, whether we thought the Common Pleas or the Privy Council right, we ought to give judgment for the plaintiffs that they should recover their costs. We are invited to say that they are not entitled to them, because they should have sued in the county court, in which (if they had sued) the Court of Common Pleas have said they would have prohibited them from proceeding. If we were so to hold, it would be ludicrous and a scandal. It is no answer to this to say that the plaintiffs might have got leave to sue in the superior courts. They might, or they might not. But what they are claiming they claim as of right, and not as a matter dependent on the opinion of any superior court as to where the action should be brought.

This being my view, and it being always a matter in which the difficulty might be obviated by leave being granted to sue in the superior courts (which I should think no judge would ever refuse), and it being in the power of the legislature to state what was or is its intention, the subject is perhaps not worth much discussion, with all respect, be it said, to the two great authorities who have differed. But if we are to choose between them, it seems to me that the Court of Common Pleas (1) was right. The difficulties in the way of the decision in the Privy Council (2) are most forcibly put in their judgment; to those are added most cogent arguments in the judgment of the Court of Common Pleas against the expediency of giving Admiralty jurisdiction in such cases as those in question, either to the High Court of Admiralty or the county court. Shortly, the objections are, that on the construction contended for by the defendants, the county court has Admiralty jurisdiction in cases in which the Admiralty Court has no original jurisdiction; that the High Court would have an appellate juris-

(1) *Simpson* v. *Blues*, Law Rep. 7 C. P. 290.

(2) *Cargo ex Argos*, Law Rep. 5 P. C. 134.

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diction where it has not an original jurisdiction; that there could be transferred to it from the county court causes which it could not originally entertain, and so it could hear and decide cases not properly within its own jurisdiction or that of the county court. To these objections are to be added, not as aiding the construction of the statute, but as helping to the probable intention of the legislature, the objections, so forcibly stated in the judgment of the Common Pleas, to Admiralty procedure being applied to such cases as those in question.

These different considerations were felt so strongly by the Privy Council that they would perhaps have decided as the Common Pleas did, but for the necessity of finding an application for words for which they saw none if the Common Pleas were right. With great respect, it seems to me a meaning may be given the words without the admittedly preposterous consequences the defendants contend for. The words are, "claim arising out of any agreement made in relation to the use or hire of any ship;" not "claim arising out of any agreement for the use or hire of any ship." I cannot think that the enactment is, in plain and intelligible language, free from any ambiguity. If I found the words without anything to control them, or guide me in their interpretation, I should say they included the cases before us, and much more. But as it is, I declare I do not know what they mean, or were intended to mean. A charterparty is not an agreement for the use or hire of a ship; but it is said to be included in "claim arising out of any agreement made in relation to the use or hire of any ship." Would that include the ship-broker's claim for finding a charter? see *The Nuova Raffaelina.* (1) Take the next words, "claim arising out of any agreement in relation to the carriage of goods in any ship." Does that include a claim on a policy of insurance? The policy is an agreement, not for, but in relation to, the carriage of goods in a ship. Some restriction must be put on the words. If the ship was in dock, and hired for a dance to be given in the dock, it surely would not be an Admiralty cause. Nor, one would think, would an agreement by the owner of a steamer to take a party to Richmond. Would a ship on Lake Windermere be within the enactment, or a barge on a canal?

(1) Law Rep. 3 A. & E. 483.

Let us read the words thus: "Shall have jurisdiction to try and determine the following causes:—Where the High Court of Admiralty has jurisdiction as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship." Are there such cases? I think there are. The High Court has jurisdiction over any "claim" (the same word) "by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of or from any breach of duty on the part of the owner, master, or crew of the ship." (1) So that the owner of goods carried into any port in England, having a claim for damage to them arising out of breach of contract by the owner of the ship, may sue in the High Court of Admiralty. But the contract broken may be a charter-party, which is a contract in a sense, though not strictly, for the use or hire of a ship. So as to the latter part of the clause, "agreement made in relation to the carriage of any goods in any ship." This would apply to claims by the charterer or shipper under a bill of lading or other owner of goods carried under charter or otherwise.

This construction gives a meaning to the words without the absurd consequences which would follow on the defendants' construction. Therefore these rules should be discharged.

As to the other points arising in one of the cases, viz. that the section as to the costs does not apply where there is judgment by default, and that it does not apply to actions in common law courts, we need express no opinion on them. The arguments presented to us were not presented to the Queen's Bench in the case of *Hewitt* v. *Cory*. (2) We do not recognise, therefore, that case as an authority against them. It seems preposterous to suppose that the legislature has intended that cases over 300*l*. may be tried either on common law or Admiralty principles, cases under 20*l*. on the same, but cases between the amounts on Admiralty principles only, except at the peril of the plaintiff losing his costs. The difficulty arises from the words "any superior court." Perhaps

(1) 24 Vict. c. 10, s. 6; see *The Pieve Superiore*, Law Rep. 5 P. C. 482.

(2) Law Rep. 5 Q. B. 418.

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they should be read as "Superior Court of Admiralty, if any." The section supposes that the judge always hears or decides the case, apparently pointing to a court where there is one judge, and where the case is always adjudged.

Rules discharged.

Gunnestad v. *Price.*

Attorneys for plaintiff: *Chester & Urquhart.*
Attorneys for defendant: *Scott, Jarmain, & Co.*

Fullmore v. *Wait.*

Attorneys for plaintiff: *White & Sons.*
Attorneys for defendant: *Stibbard & Cronshey.*

Jan. 28.

GOODWIN *v.* ROBARTS AND OTHERS.

Negotiable Instrument—Foreign Scrip issued by Agent in England.

Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment of the instalments, to delivery by the agent of definitive bonds of the foreign government on their arrival in this country, is negotiable, and passes by delivery to a bonâ fide holder for value without title.

SPECIAL CASE stated in an action brought to recover the value of Russian and Hungarian Austro-scrip sold by the defendants under the following circumstances.

In 1873 the Russian government, being about to raise a loan on bonds, employed Messrs. Rothschilds, bankers, carrying on business in the city of London, as their agents for that purpose in this country.

In pursuance of this employment Messrs. Rothschild, in December, 1873, issued in London scrip for the loan in the following (printed) form:—

"1873. C. 1873.

"Imperial Government of Russia. Issue of 15,000,000*l.* sterling nominal capital in 5 per cent. Consolidated Bonds of 1873; negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. De Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st December, 1873.

"Scrip for one hundred pounds stock, No. . Received the sum of twenty pounds, being the first instalment of twenty per cent. upon one hundred pounds stock; and on payment of the remaining instalments at the periods specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial Government.

"London, 1st December, 1873.

"The instalments are to be paid at our office as follows:—

"15*l.* per cent. or 15*l.*, on the 5th February, 1874.
"15*l.* „ 15*l.* „ 9th March „
"20*l.* „ 20*l.* „ 2nd May „
"23*l.* „ 23*l.* „ 9th June „

"Subscribers may pay the same under a discount of 3 per cent. per annum on any Monday or Thursday after the 16th instant.

"In default of payment of these instalments at the proper dates all previous payments will be liable to forfeiture."

[Here followed receipts (unsigned) for the four other instalments.]

"Imperial Russian Five per Cent. Loan, 1873. 2*l.* 10*s.*

"No.

"On the 1st June, 1874, this warrant for two pounds ten shillings, being six months' interest on 100*l.*, will be paid at the office of Messrs. N. M. Rothschild & Sons, London."

On the payment of the several instalments the printed receipts were signed by Messrs. Rothschild.

The bonds were made and delivered in Russia to Messrs. Rothschild, who, in June, 1874, issued them in London to the holders of the scrip. They were in the following form:—

"Imperial Government of Russia,
"15,000,000*l.* sterling,
"In five per cent. consolidated Russian railway bonds.
"Fourth emission.

"Created and issued in conformity with the Imperial ukase of the 14/26 November, 1873, for the railways, Odessa, &c., redeemable by annual drawings in 81 years, on the 19th November (1st December) in each year.

"C. No. 100*l.* sterling.

"The bearer of this bond is entitled to 100*l.* sterling, with

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interest at 5 per cent., until the time of the redemption fixed by the drawing, which interest will be paid half-yearly, on the 20th of May (1st June) and 19th of November (1st December) each year, on presentation of the coupons hereunto attached at either of the following places.

"At the office of Messrs. N. M. Rothschild & Sons, in London, in pounds sterling. At that of Messrs. De Rothschild Brothers, Paris, at the exchange of the day at London [and similarly at St. Petersburg, Frankfort-on-the-Maine, Amsterdam, and Berlin].

"The bonds are redeemable at par in 81 years by means of annual drawings at St. Petersburg, commencing on the 19th November (1st December) comformably with the subjoined table of redemption.

"The payment of the drawn bonds will take place six months later, at the same places, and at the same exchange as the coupons.

"Coupons due after the date of the drawn bonds must remain attached thereto, otherwise the amount of missing or unduly received coupons will be deducted from the capital on payment of the bond.

"This bond has forty-two coupons attached for 21 years, and a talon for renewal of the coupons at the expiration of that time. If the bond has not been drawn for redemption, new coupons will be delivered to the bearer without expense on application at London, or Paris, or St. Petersburg, against presentation of the talon."

[Here followed an enumeration of the bonds to be issued.]

"Agents.—N. M. Rothschilds."

[Here followed a copy of the ukase of the 14/26 November, 1873, signed by the Emperor of Russia, under which the bonds were issued.]

The Austro-Hungarian scrip was similar in form to the Russian so far as concerned the question between the parties, and was similarly issued by Messrs. Rothschild in London.

In February, 1874, the plaintiff purchased 200*l.* of the Russian, scrip, on which the instalments were fully paid up in advance, and also 300*l.* of the Austro-Hungarian scrip.

On the 27th of February, the broker through whom the plaintiff

purchased the scrip, and in whose hands it had been left to be dealt with as the plaintiff might direct, pledged it with the defendants as security for a loan of 800*l.* then made to him by them. In April he was declared a defaulter on the Stock Exchange, and subsequently absconded and was made bankrupt, and default having been made in repayment of the loan of 800*l.*, the defendants, who were ignorant of the plaintiff's claim, sold the scrip for a sum of 471*l.* 5s.

The case contained the following finding as to usage :—

"The scrip of loans to foreign governments, entitling the bearers thereof to bonds for the same amounts when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and foreign stock exchanges, and through them by the public, for above fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip, and to advance loans of money upon the security of it, before the bonds were issued, and to pass the scrip upon such dealings by mere delivery as a negotiable instrument transferable by delivery; and this usage has always been recognised by the foreign governments and their agents delivering the bonds when issued to the bearers of the scrip. This usage extended alike to scrip issued abroad by foreign governments and scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above mentioned. Such scrip often passes through the hands of several buyers and dealers in succession before the issue of the bonds represented by it."

The question for the opinion of the Court was, whether the defendants were, as against the plaintiff, entitled to the said scrip and the proceeds thereof.

Jan. 27. *Benjamin, Q.C.* (*Anstie* with him), for the plaintiff. The scrip held by the plaintiff was not negotiable paper in a legal sense, that is, so that the property in it would pass to a bonâ fide holder for value by delivery without title. It is neither a bill of exchange nor a promissory note, but merely an obligation on Messrs. Rothschild to deliver to the subscriber, on payment of the instalments by him, bonds of the Russian government to a like

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amount, provided the Russian government shall have delivered those bonds to them. The instrument is issued in England by bankers residing here; it does not come into England as a document existing abroad and bearing in the place of its issue the character of negotiable paper; and the question, therefore, is, whether it is in the power of bankers and financiers here to create a new species of negotiable paper without the authority of Parliament. In *Dixon* v. *Bovill* (1), in the case of iron warrants, it was decided, on general principles equally applicable to this case, that it was not possible by the custom of the market to create new classes of negotiable instruments.

[BRAMWELL, B. Does this scrip contain any promise or engagement by Messrs. Rothschild?]

It contains no statement or promise except by them. The Russian government is no doubt engaged to Messrs. Rothschild, but it is not engaged to the public; it is only hereafter to become engaged to them by the issue of the definitive bonds. Messrs. Rothschild are to be the agents of the Russian government in distributing the bonds when they arrive; in the meantime they themselves issue the scrip and sign the receipt, not signing as agents, and by the terms ot it engage that if the Russian government provides them with the corresponding bonds, they will issue them to the lawful holders of the scrip. This distinguishes the case from *Gorgier* v. *Mieville* (2), which was the case of a definitive bond, signed by the King of Prussia and issued in Prussia, and which came to England with the character of a negotiable instrument. The scrip here is no more equivalent to such a bond than an undertaking to give a bill of exchange is equivalent to a bill of exchange. It stands on no higher footing than other paper issued in England, and treated in the market as negotiable, though not such by law, and is entirely within the decision of the Court of Queen's Bench in *Crouch* v. *Crédit Foncier*. (3)

Brown, Q.C. (*Robarts* with him), for the defendants. *Crouch* v. *Crédit Foncier* (3) is no authority in the present case, for this is not an English instrument, but is an instrument issued by a foreign sovereign through his agent in England, and negotiable all over

(1) 3 Macq. 1. (2) 3 B. & C. 45.
(3) Law Rep. 8 Q. B. 374.

Europe. It is not, in fact, distinguishable from the foreign bonds which were treated as negotiable in *Gorgier* v. *Mieville* (1) and *Attorney-General* v. *Bouwens.* (2) The scrip shews, on the face of it, that Messrs. Rothschild assume no personal responsibility, but act only as the agents of the Russian government. It is in that capacity that they sign the receipts for the instalments, and there are no words of contract in the instrument. Agents acting for a foreign government are not personally liable: Story on Agency, §§ 302, 303, 304; the contract is with the foreign government only. The whole transaction, the scrip not less than the bonds to which the scrip is only preliminary, is founded on the ukase of the Emperor of Russia, and the instrument is not an English, but a Russian instrument. The scrip cannot, therefore, properly be described as a chose in action, which signifies a contract which can be enforced by action or suit: Williams on Executors and Administrators, 7th ed., vol. i. p. 784; for there is no person against whom it could be enforced, either at law or in equity: *Duke of Brunswick* v. *King of Hanover* (3); *De Haber* v. *Queen of Portugal.* (4) It is, in substance and fact, the instrument of a foreign government, and as such forms, by general mercantile usage, a part of the currency of Europe: *Lang* v. *Smyth* (5); *Wookey* v. *Pole* (6); *Miller* v. *Race* (7); *Mercer County* v. *Hacket.* (8)

[BRAMWELL, B. That case seems directly contrary to *Dixon* v. *Bovill.* (9)]

Benjamin, Q.C., in reply. This is a contract made in London, and to be executed in London, and is, therefore, an English contract. The cases referred to were all cases of promises to pay money; this is only an undertaking to deliver a bond, when it is provided. Whatever might be the case, if the scrip were really issued abroad, it can no more be in the power of a foreign government (even assuming this to be the act of a foreign government) than of a private person to issue in England, as negotiable paper, paper which is not by the law of the country negotiable.

Cur. adv. vult.

(1) 3 B. & C. 45.
(2) 4 M. & W. 171.
(3) 2 H. L. C. 1.
(4) 17 Q. B. 171; 20 L. J. (Q.B.) 488.
(5) 7 Bing. 284.
(6) 4 B. & Ald. 1.
(7) 1 Sm. L. C. (6th ed.) p. 468.
(8) 1 Wallace, R., 83, at p. 95.
(9) 3 Macq. 1.

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Jan. 28. BRAMWELL, B. This case, which was argued before us yesterday, was said, and said truly, to raise a very important question. Scrip of this nature is dealt with to the extent of millions, and no doubt the question is of importance, not only as between buyers and sellers, but also to those foreign governments who wish to raise money, and to those who raise it for them in this country. But I think it is quite clear what our decision should be. The case of *Gorgier* v. *Mieville* (1) is in force, and not overruled; and it was there decided, in the case of a Prussian bond, that a bonâ fide holder for value was entitled to it as against a rightful owner from whom it had been stolen, or who had been wrongfully deprived of it. It was therefore admitted in this case, and could not be denied, that if this had been a bond, the defendant would have been entitled to our judgment; but it was said that, this being scrip, it would be otherwise. In the judgment of Abbott, C.J., in *Gorgier* v. *Mieville* (1), he states it as the reason of his decision that, by the course and practice of the market, of the people who buy and sell and deal in, and are interested in and are liable upon, the bonds in question, the property in them passes by delivery to a bonâ fide holder for value. As far as one can see, that is a reason of general application. But no doubt Mr. Benjamin has a right to argue that, although the Court put no qualification on that general reason, yet they must be taken to be applying it to the case they were dealing with—that is, the case of a bond; and that the subsequent case of *Crouch* v. *Crédit Foncier* (2) shews that an engagement to pay money to bearer, not entered into by a promissory note or a bill of exchange, is not transferable from hand to hand so as to give a title to the person who receives it, although he takes it for valuable consideration, as against one wh had been deprived of it, and that the law does not allow the effectual creation of such instruments as negotiable instruments; that such an instrument is no more in the situation of a bond than an engagement or undertaking to give a promissory note is in the situation of a promissory note; and that, as an undertaking to give a promissory note could not be made transferable from hand to hand, either by practice or custom, neither can an instrument of this nature be made so transferable.

(1) 3 B. & C. 45. (2) Law Rep. 8 Q. B. 374.

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But that argument is made on the assumption that Messrs. Rothschild are here the contracting parties. Now, I am clearly of opinion that they are not, and that they enter into no contract. They are the mere agents for the negotiation of the loan, or so much of it as is negotiated in London; another firm of Messrs. Rothschild being agents for the negotiation of the loan in Paris. In my opinion, they do not undertake that the bonds shall be delivered. They do not undertake even that if the bonds come to England they shall be delivered. They do not undertake the payment of interest. They do not undertake any obligation of any sort or kind. They simply receive the money for the Russian government from the parties who subscribe the loan, and who hold these documents, having no rights against the Messrs. Rothschild, but having rights, such as they are, against the Russian government only.

Being of that opinion, I am of opinion that this scrip is as much a Russian instrument as the bond itself would be. And I confess it appears to me shocking to one's common sense to hold that this thing, whatever it is called, which will result in a bond, which is a sort of interim bond, which is something preparatory to a bond being given, which is of a temporary character and is to terminate in a bond, is itself in a plight different as to negotiability from that which the bond would be in. It would be drawing a distinction which would be utterly unintelligible to the commercial world at large. I can see no ground for such a distinction, and therefore, on the ground that *Gorgier* v. *Mieville* (1) shews that if this had been a Russian bond the defendants would have been in the right, and that to my mind this instrument is as much a Russian instrument as a Russian bond would be, I think that what would be true of the bond is true also of the scrip, and that the defendants are therefore entitled to our judgment.

If *Gorgier* v. *Mieville* (1) did not exist, the topics which have been urged upon us as to the locality of the contract, and the power of the Emperor of Russia to make an instrument negotiable here, might be very properly discussed; but as that case is an existing and binding authority, it is conclusive upon these matters,

(1) 3 B. & C. 45.

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and the only question is whether you can distinguish between the bond and the scrip.

One other observation I will make. It is manifest on the finding of this case that when the scrip is taken to Messrs. Rothschild, or (I ought perhaps to say) to the Russian government, they undertake that they will give to the holder of the scrip a bond; and I understand, from the statement of the facts, that if the plaintiff were to go to them and say, "Do not give it to the defendants; give it to me, because I am the rightful owner of the scrip," they would refuse to do so. They would say, "No; we shall recognise the bonâ fide holder for value, whoever he may be." If that is so, it seems to me to be extremely difficult to say that the documents can be intercepted in anybody's hands in the meanwhile. I think our judgment must be for the defendants.

CLEASBY, B. I am entirely of the same opinion. And I might leave the case on the grounds so clearly stated by my Brother Bramwell; but I should like to add a few words on what I consider to be the nature of these instruments. They emanate from the government of Russia, and to understand the matter I think we must go back to the ukase of the Emperor. It appears from that document that money is wanted for the construction of railways, and that for that purpose it is necessary to raise a loan of 15,000,000*l*. It is stated that subscriptions will be opened, and this loan, when contracted, will be met by bonds. The loan is contracted on this footing, that the persons, whoever they may be, holding these documents shall, if the Russian government keeps faith with them, receive bonds on payment of their subscriptions by instalments at stated times, under which they will be entitled to receive payment at the times and according to the drawings specified in the bonds. The bond is then the document of title for a part of the loan. It is not money. The value of it depends on the manner in which the Russian government keeps faith with the subscribers. It is really the document of title by virtue of which persons can go to the Russian government and receive (if the Russian government keeps faith with the public) certain payments.

That being the nature of the bond, in what respect does this other document differ from it? Is it not the title by virtue of

which the person holding it, according to the terms of it, can call upon the government of Russia to give him the title to the money, that is, to give him the bond? The bond is not the money, it is only the title to the money. This document is founded upon the same idea, that the Russian Government will keep faith and give to the holders of these documents, according to its terms, the benefit which it holds out to them. It is, therefore, the document of title issued by the Russian government as binding upon them, and, as in the case of the bond, they make the bearer of it entitled to payment. The heading of the document is sufficient to indicate its nature. "Imperial Government of Russia. Issue of 15,000,000*l.* sterling nominal capital in Five per Cent. Consolidated Bonds of 1873." It is true that Messrs. Rothschild have signed the document on their own behalf; but as soon as they have signed the first receipt, it is authenticated by them as the document of the Imperial government of Russia, and that is, in my opinion, the only effect of their signature. The bonds are authenticated by the signature of the Emperor himself. What is this scrip, then, but the act of the Russian government? So it becomes a document of title by which the bearer is entitled to the repayment of certain money advanced, and it has, in my opinion, precisely the same character as the other. But for the advantage which the public receive of making the loan by instalments, there is no necessity for the scrip at all; and the moment the first instalment is paid there is no obligation on any one to pay another, and there may be an end of the transaction. It is issued by the Russian government as a document of title, and by which the person holding it is not only to receive a bond, but is entitled to receive money just as much as he is entitled to receive it on the bond itself, for there is at the foot of the scrip the entry, "On the 1st of June, 1874, this warrant for 2*l.* 10*s.*, being six months' interest on 100*l.*, will be paid at the office of Messrs. Rothschild & Sons, London." Therefore, when the matter is really looked at, it is impossible to make any sound distinction between the bond and the scrip; they both represent a title to receive money from the Russian government. We have, then, a clear guide in *Gorgier* v. *Mieville* (1), and there is nothing in the case of *Crouch* v.

(1) 3 B. & C. 45.

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Crédit Foncier (1), or in *Dixon* v. *Bovill* (2), to conflict with our decision.

Judgment for the defendants.

Attorney for plaintiff: *J. B. Batten.*

For appeal see page 337

Attorney for defendants: *J. H. Mackenzie.*

Feb. 10.

[IN THE EXCHEQUER CHAMBER.]

LEWIS *v.* DAVIS.

Penal Action—Clerk of Justices—Taking Fee other than that in authorized Table—26 Geo. 2, c. 14—Table of Fees not made at Sessions next after June, 1753—Venue, when local—Action as Informer by Person grieved—31 Eliz. c. 5—21 Jac. 1, c. 4.

In an action, under 26 Geo. 2, c. 14, s. 2, to recover penalties against a clerk of justices for taking a fee higher than that in the authorized table, the venue is local, under 31 Eliz. c. 5, though the plaintiff happen to be the person grieved.

Declaration (venue Middlesex) that a table of fees to be taken by the clerks of justices for Monmouthshire directing that the fee to be taken for every recognisance to prosecute, &c., should be 4*s.*, was, pursuant to 26 Geo. 2, c. 14, made and settled by the justices at quarter sessions, approved at the quarter sessions next succeeding, and afterwards laid before the judges at the next assizes, who, on November the 15th, 1842, approved and ratified the same, and that three months afterwards the defendant, as clerk to the justices, demanded and received of the plaintiff 8*s.*, as the fee for taking and acknowledging a recognisance, whereby, and by force of the statute, the defendant became liable to pay the plaintiff 20*l.* :—

Held, on demurrer, that the declaration was bad, as the Act 26 Geo. 2, c. 14, s. 2, in imposing a penalty of 20*l.* for demanding a greater fee than that established, enabled any person to sue as informer, and the plaintiff sued as informer, though he happened also to be the person grieved.

By 26 Geo. 2, c. 14, s. 1, "the justices of the peace throughout England, at their respective general quarter sessions of the peace, to be held next after the 24th day of June, 1753, shall and they are required to make and settle a table of fees, &c. And it shall and may be lawful for the said justices in their respective quarter sessions assembled from time to time to make any other table of fees to be taken instead of the fees contained in the table."

Semble, per Blackburn, Mellor, and Archibald, JJ., that the power to make a fresh table of fees does not depend upon a previous table having been made at the sessions next after June, 1753.

DECLARATION (venue Middlesex) that a certain table of the fees to be taken by the clerks of justices of the peace within

(1) Law Rep. 8 Q. B. 374. (2) 3 Macq. 1.

and for the county of Monmouthshire, directing that the fees to be taken for every recognisance to prosecute or answer or be of good behaviour, inclusive of notice, be the sum of 4*s.*, was, pursuant to 26 Geo. 2, c. 14, made and settled by the justices of the peace for the county, at a general quarter sessions in and for the county, and was afterwards approved at the general quarter sessions of the peace in and for the county next succeeding and afterwards, at the assizes holden in and for the county next after the general quarter sessions, at which the same was so approved, was laid before the judges of assize, who, on the 15th of November, 1842, approved, ratified, and confirmed the same, which then became and was of validity and effect within the county; and that, after the space of three calendar months from the 15th of November, 1842, when the table of fees was made and ratified, the defendant, then being and acting within the county as clerk to the justices of the peace in and for the county, under the pretence of the taking and acknowledging of a certain recognisance taken and acknowledged before the justices at a general quarter sessions in and for the county, by E. Lewis and J. M. W. Lewis and A. Adams, her sureties, in the sum of 10*l.* each, conditioned for the appearance of E. Lewis, to answer further to a charge of larceny, demanded and received of the plaintiff the sum of 8*s.* as and for the fee due and payable by the plaintiff to the defendant, for the taking and acknowledging of such recognisance, which sum of 8*s.* was another or greater fee than at the time of such demanding and receiving, was ascertained, ratified, and confirmed in manner directed by the statute, whereby, and by force of the statute, the defendant forfeited and became liable to pay to the plantiff for his offence the sum of 20*l.* [There were two other counts in a similar form.]

Demurrer and joinder in demurrer.

The demurrer came on for argument in the Court of Exchequer in Easter Term, 1874, when the Court gave judgment for the defendant, no counsel appearing on behalf of the plaintiff. The plaintiff brought error.

Feb. 10. *Poland* (*Aspland* with him), for the plaintiff. The declaration is good. The objection stated in the margin of the

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demurrer is, that it is not shewn that a valid table of fees was in force at the time of the receipt of the money by the defendant. The question, therefore, is, whether the table of fees stated in the declaration to have been made in 1842, is good within the Act 26 Geo. 2, c. 14. (1) It will be contended that, on the true construction of the Act, if the justices omit to make their table of fees in the year 1753, they can never make it afterwards. But the words of the Act as to this date are directory only. In *Bowman* v. *Blyth* (2), a table of fees had been made at the June quarter sessions, submitted for approval to the next October quarter sessions, and then adjourned for consideration to the January sessions, at which it was

(1) 26 Geo. 2, c. 14, s. 1: "The justices of the peace throughout England, at their respective general quarter sessions of the peace to be held next after the 24th day of June, 1753, shall and they are hereby required to make and settle a table of the fees which are to be taken by clerks to justices of the peace, and such tables, being approved by the justices of the peace at the next succeeding general sessions of the peace, with such alterations as such justices so assembled shall think proper, shall be laid before the judges at the next assizes, and the said judges are authorized and required to ratify and confirm such tables in such manner and form as the same shall be made, settled, and approved of by the said justices, or with such alterations, additions, or abatements as to such judges shall appear just and reasonable." The section then proceeds to authorize the "justices of the peace in their respective quarter sessions assembled from time to time to make any other table of fees to be taken instead of the fees contained in the table which shall have been ratified and confirmed by the judges of assize, and after the same shall have been affirmed by the justices of the peace at the next succeeding general quarter sessions, in manner as aforesaid, to lay such new table of fees before the judges at the next assizes, who are hereby empowered and authorized to approve and ratify the same in manner as aforesaid, if they think fit; but no table of fees to be made and settled by the respective justices of the peace shall be of any validity or effect whatsoever until the same shall be ratified and confirmed by the said judges."

By s. 2: "If at any time after the space of three calendar months from the time that such table of fees shall be made and ratified as aforesaid any clerk or clerks to any justice or justices of the peace, or any person or persons acting as such, shall, under pretence of any matter or thing done, transacted, or performed by such justice or justices in the execution of his or their office or offices, or done, transacted, or performed by such person or persons as clerk or clerks to such justice or justices, demand or receive any other or greater fee than shall have been ascertained, ratified, and confirmed in manner as aforesaid, such person shall for every such offence forfeit and pay twenty pounds to any person who shall sue for the same by action of debt, &c., in any of His Majesty's courts of record at Westminster," &c.

(2) 7 E. & B. 26; 26 L. J. (M.C.) 57.

approved of, and afterwards ratified and confirmed at the following assizes, on the 5th of April, 1838. It was held that the table was not duly approved, as the approval ought to have been given at the October sessions, and they had no power to adjourn the consideration of the matter; but Lord Campbell, in giving judgment, says (1): "The result is, that there is no table of fees now in force in Norfolk, and a new one must be made," shewing that, in his opinion, the statute did not require that the table should be made not later than 1753. It is quite reasonable that, where there has been a delay in considering the fees, the matter should be commenced de novo, and that the sessions, when they have once started, should not be allowed to go on adjourning the consideration of the amount of the fees, until the interest in the subject has died out. But it is not material that the sessions should commence in any particular year. It cannot be supposed that if the sessions throughout England did not exercise this power in 1753, all the tables of fees are invalid.

[He then referred to several other objections to the declaration, which were overruled by the Court, as being only matters for special demurrer.]

Lastly, it is said, that the venue ought to have been local. This point raises the question, whether the Act 31 Eliz. c. 5 (2) applies to an action, like this, by the party grieved. That Act is only directed against common informers. Here the plaintiff is the party grieved. In *Fife* v. *Bousfield* (3) it is expressly laid down on the authority of *Allen* v. *Stear* (4) and *Calliford* v. *Blaw-*

(1) 7 E. & B. 46; 26 L. J. (M.C.) 61.

(2) By 31 Eliz. c. 5, "An Act concerning Informers," it is enacted (s. 2) "In any declaration or information at any time after twenty days after the end of this session of parliament to be had, brought, sued, or exhibited, the offence against any penal statute shall not be laid to be done in any other county, but where the contract or other matter alleged to be the offence was in truth done."

By 21 Jac. 1, c. 4, s. 2, "In all informations to be exhibited, and in all bills, counts, plaints, and declarations in any action or suit to be commenced against any person or persons either by or on the behalf of the king, or any other, for or concerning any offence committed or to be committed against any penal statute, the offence shall be laid and alleged to have been committed in the county where such offence was in truth committed, and not elsewhere."

(3) 6 Q. B. 100.

(4) Cro. Eliz. 645.

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ford (1), that the statute of Elizabeth applies to common informers only, and not to a party grieved; and that the effect of 21 Jac. 1, c. 4, s. 2, is to re-enact the provisions of 31 Eliz. c. 5, s. 2, with some alteration as to the mode of taking advantage of any objection as to the venue.

[BLACKBURN, J., referred to *Dyer* v. *Best* (2), where it was held that the statute of Elizabeth applies to a person suing for a penalty for himself alone in the same manner as though he sued as an informer qui tam.

DENMAN, J. You claim in your declaration "by force of the statute."]

If the plaintiff, though a common informer, happens to be the person grieved, the Act does not apply.

[LUSH, J. The defendant might have pleaded the pending of another action by a common informer for the same offence. Does not "party grieved" mean the party grieved according to the provisions of the legislature? Here the statute does not create a party grieved.]

Lane (*H. Mathews*, *Q.C.*, with him), for the defendant, was not heard.

BLACKBURN, J. I think we need not trouble the counsel for the defendant, as the point now before us is quite clear. The statute 31 Eliz. c. 5, s. 2, says, in as plain words as can be, that an offence against any penal statute shall not be laid to be done in any other county but where the contract, or other matter alleged to be the offence, was in truth done. Here the offence is created by the Act 26 Geo. 2, c. 14, s. 2, and by that section an action is given to any person to recover a penalty of 20*l.* against any one who demands a greater fee than that which is established. And we find that the venue is laid in Middlesex, though the offence was committed in Monmouthshire, and the venue ought, therefore, to have been there. Now, it is quite true that there have been decisions to the effect that where a penalty is expressly given by statute to the party grieved, such party is not within the statute of Elizabeth. We need not consider whether at the present day the Exchequer Chamber would follow these decisions. Here the penalty

(1) 1 Show. 353. (2) Law Rep. 1 Ex. 152.

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is given to the informer only, and it would be an anomaly if the venue should not be local if the informer should happen to have a grievance, and that the rule should be different where he had none. This point is sufficient to dispose of the case. We give no decision on the first point, as to whether it is necessary under the Act that a table of fees should be first made and settled in 1753. I should have wished to hear the counsel for the defendant on this point, and I have had a great deal of doubt as to whether the power from time to time to make any other table of fees instead of the table confirmed by the judges of assize, may be exercised where no table was made in 1753. But I am at present inclined to think that these words may very well mean that the justices shall have power to make a fresh table of fees at any time after the year 1753, and that it was not meant to make the exercise of the right in that year a condition precedent to its exercise thereafter. This is the inclination of my opinion, but, of course, it might have been changed by the argument on the other side.

MELLOR, J. I am of the same opinion. With regard to the question as to the exercise of the power to make a table of fees, I think this case is distinguishable from *Bowman* v. *Blyth* (1), where the question was whether the sessions, to whom the table was submitted for approval, had power to adjourn the consideration of it to the next sessions. I think that the Act only intended to prescribe generally the steps for making fresh fees in substitution for those which existed, and did not contemplate any particular year. This opinion is, of course, no part of our decision, but I think it right to express it.

LUSH, J. I concur in the opinion of my learned Brothers as to the necessity of the venue being local. The statute of Elizabeth applies to all common informers, whether they are parties grieved or not.

GROVE and DENMAN, JJ., concurred.

ARCHIBALD, J. I am of the same opinion. The statute of Geo. 2 does not create any grievance, but gives a right to any

(1) 7 E. & B. 26; 26 L. J. (M.C.) 57.

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person to sue for the penalty. As to the other point, my present opinion is that it is not essential that a table of fees should have been made at the sessions first held after June, 1753.

Judgment affirmed.

Attorneys for plaintiff: *Clennell & Fraser.*
Attorneys for defendant: *Few & Co.*

Feb. 11.

[IN THE EXCHEQUER CHAMBER.]

MILL *v.* HAWKER AND OTHERS, AND WICKETT.

Trespass—Highway Board—Individual Corporators—District Surveyor—Personal Liability—5 & 6 Wm. 4, c. 50, 25 & 26 Vict. c. 61.

2&D26

At a meeting of the members of a highway board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across it. The surveyor of the board was afterwards ordered by them to remove the lock, and did so. On the trial of an action of trespass brought by the plaintiff against the members of the board in their personal capacity and the surveyor, in which the defendants justified, Kelly, C.B., nonsuited the plaintiff on the ground that neither the members of the board nor the surveyor were liable individually. No evidence was therefore given in support of the plea of justification. The Court of Exchequer (Kelly, C.B., dissenting) having set aside the nonsuit and ordered a new trial on the ground, first, that assuming that the resolution was illegal the members of the board who concurred in it were personally responsible; secondly, that the fact that the surveyor was, by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board, did not excuse him if in obeying their orders he did an unlawful act:—

Held, by the Exchequer Chamber (expressing no opinion as to the liability of the members of the board), that the surveyor was liable, and that the judgment setting aside the nonsuit must therefore be affirmed.

APPEAL by the defendants from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit. (1)

The facts are fully stated in the report of the case in the Court below, and may be sufficiently understood from the head-note to the present report.

Feb. 10, 11. *Kingdon, Q.C.* (*Lopes, Q.C.*, and *Pinder* with him) for the defendants. First, the defendants, who are members of the

(1) Law Rep. 9 Ex. 309.

highway board, are not personally liable. [It is unnecessary to refer to this part of the argument, as no judgment was given on the point.] Secondly, Wickett, the surveyor of the highway board, is not liable. By the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 16, it is enacted that the surveyor "shall in all respects conform to the orders of the board in the execution of his duties." He is therefore bound to obey the commands of the board, and his position is analogous to that of a bailiff or other officer executing the process of a court of justice. It has always been held that such an officer may in an action of trespass justify under the process of the court, though it had no foundation in point of fact: *Dews* v. *Riley* (1); *Andrews* v. *Marris*. (2) The surveyor is a public officer acting for a public body.

[BLACKBURN, J. The Chief Baron having nonsuited the plaintiff, I think we must assume that the path in question was not a highway. It follows that the board acted without jurisdiction. And though the surveyor must obey the board, it is "in the execution of his duties."]

The immunity of a judicial officer does not depend upon the process being within the jurisdiction of the Court: *Moravia* v. *Sloper*. (3) Under s. 17 of the Act the board are to keep in repair the highways within their district. It is therefore for the board to determine, as between themselves and their officers, which are the highways. The surveyor cannot inquire whether any order given to him is legal or not.

[BLACKBURN, J. He has two courses. He can insist upon an indemnity before acting, or he may require the board to have recourse to legal process.]

It is unreasonable to require that the surveyor should be satisfied that any act which he is called upon to perform is within the jurisdiction of the board; it is enough that it is apparently within their jurisdiction.

Arthur Charles (*H. T. Cole, Q.C.*, with him) first argued the question as to the personal liability of the members of the board. Secondly, with regard to the surveyor, he is liable as the hand which did an illegal act. The Act 5 & 6 Wm. 4, c. 50, ss. 69,

(1) 11 C. B. 434; 20 L. J. (C.P.) 264.

(2) 1 Q. B. 3.

(3) Willes, Rep. 30.

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73, 74, contains provisions which shew that in the case of supposed obstructions to a highway, it was intended that the surveyor should not act mero motu, but should make complaint to the justices. The defendants' argument upon s. 16 of the later Act must go the length of saying that the surveyor must accept the orders of the board, no matter what they are. The case has no analogy with that of the execution of process by officers of courts of justice. It is subject to the ordinary law of master and servant.

He also repeated the arguments urged in the Court below.

Kingdon, Q.C., in reply.

BLACKBURN, J. This action was brought against several defendants, one of whom was the surveyor of the highways and the others members of the highway board, which is made a corporation by the late statute. The Lord Chief Baron at the trial decided, for reasons which I will consider presently, that the action would not lie against either of the defendants—neither against the surveyor nor the rest; and he directed a nonsuit, the question as to whether the place in dispute was a highway not being discussed. Upon application to the Exchequer, the majority of that Court (the Lord Chief Baron dissenting) set aside the nonsuit, and ordered a new trial on two distinct grounds. They thought the Chief Baron wrong in saying that the surveyor was protected, and that no action would lie against him, and that he was also wrong in saying that no action would lie against the corporators. Now, the appeal before us is from that decision; and we are all of opinion that, as regards the surveyor, the nonsuit was wrong, and that the rule ordering a new trial was right. And inasmuch as it was one nonsuit, where the parties were sued together in a single action, the decision that the nonsuit was improper as regards one, sets it aside as regards all, and consequently the judgment making the rule absolute must be affirmed. In arriving at this conclusion we proceed upon the ground that the surveyor was clearly liable.

Now, with regard to the other question which has been raised and discussed, as to whether the corporators were liable, it is one of considerable importance and great difficulty. If it were neces-

sary to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous. Our decision would be of no assistance in sending the case down to trial, and would perhaps be an embarrassment to the learned judge who may have to try it. We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before, no better and no worse. On the new trial the facts will be ascertained, and the point reserved in such a manner that the Court before which it comes will be much better able to deal with it than they would be if they were to consider it now.

I will now shortly give my reasons for thinking that the surveyor is liable; and in stating those reasons I believe that I express the opinions of all the judges. If the board had authority given to them by the statute to determine whether a disputed highway was a highway, and consequently were authorized to break into a close where they supposed that there was a highway, but where there was not a highway, though they honestly and bonâ fide believed there was; if there had been any such authority given to them, and if the surveyor was acting under their orders, I should apprehend that he would be protected. Sect. 16 of 25 & 26 Vict. c. 61, enacts that "the district surveyor shall act as the agent of the board in carrying into effect all the works and performing all the duties required to be carried into effect or to be performed by the board." If the board had authority given to them to enter into a close where there was no highway, but where they really believed there was a highway, and they directed their surveyor to go there, that would be a duty in which the surveyor would be directed to act. But then the section goes on—"and he shall in all respects conform to the orders of the board in the execution of his duties." If the statute said to a man, "You are to obey the orders of a particular person," it would be very hard to punish him if he did not obey those orders, and at the same time to make him liable if he did obey them. But when you come to look at the matter, the board must have some power or duty to order what is to be done, and the surveyor, who is to do it for them, is to obey their directions. The Act does not say that when the board think

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that they have an authority, but have not that authority, that the surveyor is to act upon their directions, and, consequently, that while acting on their directions he is to be protected.

Now, as to the question whether any jurisdiction or authority is given to the ancient surveyor of highways, and to the highway board which is substituted for him, to break into a close which is private property, but where they think there is a highway, one is somewhat embarrassed through not knowing on what ground the board believed this path to be a highway. No board has power to decide whether a certain way is a highway; but they may, if they like, or anybody may, if he likes, raise the issue at common law and have it decided. There are provisions in this statute under which the question whether a certain place is a highway may be brought before the justices for decision, but there is no power for any board or other officer to decide it. Any one acting upon such a decision, does so at his peril. Mr. Kingdon endeavoured to point out some section which gave this power. I can see none. Mr. Charles argued that even if it had been a highway, the surveyor had no right to remove the obstruction. How that would be I do not say; it is not the question here. We must, in favour of the plaintiff, assume that if he had not been stopped he would have proved that this was not a highway; and if he had proved that it was not a highway, the question whether the surveyor would have the right to remove an obstruction across a real highway, would not have arisen. Here a gate on a close, which has not been proved to be a highway, has been broken through, and there is no clause in the Act of Parliament which says that this can be done. It does not give the board a right to remove something from that which is not a highway, but which they think is a highway. If this be the case, the ground on which the Chief Baron held that the surveyor was not responsible, seems totally to fail. The exception is only that of people acting for courts of justice, or perhaps where any Act of Parliament says that they must in all events obey. But it certainly does not apply to such a case as the one before us, where the Act only says that the surveyor shall obey lawful orders. For these reasons I think that the judgment of the Court below ought to be affirmed; but we must only be taken to add the confirmation of a court of appeal to

that part of the judgment which proceeded on the ground that the surveyor was liable.

MELLOR, J. I am of the same opinion. I think the true limit of the surveyor's obedience is while the board is acting legally, not when it is acting illegally. Where he is protected from the consequences of any act, the board are protected, but if the board order him to do anything which it is beyond their power to order, then I take it that he is no longer protected. I take this to be the meaning of s. 16, and I agree that the judgment of the Court below, so far as the surveyor is concerned, should be affirmed.

LUSH, J., concurred.

GROVE, J. I also agree in the opinion which has been expressed. It is admitted for the purposes of this part of the case that the board is liable in its corporate capacity for an act which, for the purposes of the case, is admitted to be unlawful; and here the surveyor commits that unlawful act, for which he should be held legally responsible. Therefore the whole question—for no other question has been brought to bear upon the matter—is whether by s. 16 he is exempted from that liability. [The learned judge read the section.] It seems to me that it would be straining the Act to say that the section actually exempts the surveyor from all legal liability. If the rendering which is contended for by Mr. Kingdon were adopted, it would virtually give him such an exemption, for I do not see any words in the section which would limit that exemption. But I see nothing to give it a wider limitation than that of things lawfully ordered by the board. It is confined to carrying into effect the duties by the Act required. No case has been cited by Mr. Kingdon in support of his argument except the case of officers executing legal process, and acting in the execution of duties conferred upon them by courts of law. This seems to me to shew that the exemption claimed here is not an exemption which would be likely to exist, for if it had we should probably have had some cases more expressly in point. I think I ought to add that I have entertained some doubt as to whether the Court ought not to have given judgment on both points, but that doubt is not sufficient to

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induce me to differ from the rest of the Court, more especially as the Court will be in fuller possession of the facts after the trial.

DENMAN, J. I am of the same opinion. The question as to the liability of the surveyor seems to me to depend entirely on the words of 25 & 26 Vict. c. 61, s. 16, and the words relied upon by Mr. Kingdon are these:—"He shall in all respects conform to the orders of the board in the execution of its duties." To ascertain the real meaning of these words we must go to the earlier part of the clause, which says: "he shall act as the agent of the board in carrying into effect all the works and performing all the duties required to be carried into effect, or to be performed by the board." What are those duties? They are duties relating entirely to public highways, and for the purposes of this case we are bound to assume that the particular place in which the surveyor attempted to execute his duties on the occasion complained of, was a place which was not a public highway. If so, I think it follows from the reasons given by my Brother Blackburn, that the board had no jurisdiction over that place. Then, if the board had no right to do what they did, had the surveyor any right to act under their authority in the manner complained of? Well, the words are, "he shall in all respects conform to the orders of the board in the execution of his duties." If this was not a highway, he would have no duties there at all, and he cannot therefore resort to this clause as affording him a protection. The cases relied upon have been cases of a peculiar kind. The case of *Dews* v. *Riley* (1), and the case of *Andrews* v. *Marris* (2), the only two which told in favour of Mr. Kingdon, were cases relating merely to duties performed by officers under the orders of a court of justice. These cases are not applicable to the present case, but the general rule is applicable, that a man who has done a wrong is responsible for that wrong. Here the surveyor has done an act upon an object with which he had no duty to interfere. Therefore he, at all events, is responsible.

With regard to the question as to the corporators being personally responsible, I think that is a matter of great difficulty, and that it would be better not to send down the case with a divided

(1) 11 C. B. 434; 20 L. J. (C.P.) 264. (2) 1 Q. B. 3.

opinion, or, by taking time to consider, to prevent the case from being tried at the next assizes.

ARCHIBALD, J. I entirely agree as to the inexpediency of taking time to consider the question as to the personal liability of the corporators, as to which there may probably be some difference of opinion. As regards the surveyor, it appears to me that the effect of s. 16 is to make him the executive of the board, and any orders which he may receive to carry out their lawful duties, are orders which he ought to obey. If they go beyond this limit he ought not to obey them, and would not be justified in obeying them. Here it is admitted that the spot in question was not a highway; and nothing has been cited to shew that the board would be justified in committing a trespass upon land which is not a highway. Consequently, this was no part of their duties; and I think it was no part of the duty of the surveyor to obey their orders to commit that trespass. For these reasons I agree that the judgment of the Court below on this point should be affirmed.

Judgment affirmed as regards the liability of the surveyor.

Attorneys for plaintiff: *Pattison, Wigg, & Co., for White & Dingley, Launceston.*

Attorneys for defendants: *Coode, Kingdon, & Cotton, for Hawker, Boscastle.*

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Feb. 9.

[IN THE EXCHEQUER CHAMBER.]

RADLEY AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Contributory Negligence—Railway Bridge.

1 Ap. Cas 756.

The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' empty trucks from their line, the plaintiffs removing them as they thought fit. The defendants were accustomed to bring such empty trucks along their main line at any hour by day or night, and, without notice to the plaintiffs, to shunt such trucks on to the siding and leave them there to be disposed of by the plaintiffs. One Saturday evening, after working hours, the defendants brought on to the plaintiffs' siding and left there trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at the plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs which pushed the loaded truck up to the bridge, by which means the further progress of the train of trucks was checked. The engine-driver, believing that the obstruction was caused by a break, drew back the engine, and gave with it such a push to the train that the loaded truck knocked down the bridge. In an action for the damage so done, the jury found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck:—

Held, by the majority of the Exchequer Chamber (Denman, J., dissenting), reversing the decision of the Court of Exchequer, that there was evidence of contributory negligence to go to the jury.

APPEAL by the defendants from a decision of the Court of Exchequer making absolute a rule for a new trial on the ground of misdirection, and that there was no evidence of contributory negligence to go to the jury. (1)

The cause was tried at the Liverpool Summer Assizes, 1873, before Brett, J., when the following facts were proved:—

The plaintiffs are colliery proprietors owning and working the Sankey Brook Colliery, close to which there was a mineral branch of the defendants' railway called the Parr Branch.

In connection with the Parr Branch there are certain sidings on the land of the plaintiffs, and belonging to them, made by them for convenience of transferring and carrying coal raised from their colliery to and by the defendants' line of railway.

(1) Law Rep. 9 Ex. 71.

Upon these sidings of the plaintiffs no engine of the defendants was accustomed to run throughout, and they were used solely, as far as the defendants were concerned, for placing therein returned empty waggons by the defendants and removing waggons therefrom when filled with coal. Waggons once left on these sidings by the defendants were entirely within the control of the plaintiffs.

The defendants were accustomed to bring empty returned waggons along the Parr Branch at any hour by day or night, and without notice to the plaintiffs to shunt such waggons on to the plaintiffs' sidings, where they were left under the plaintiffs' control.

Part of the sidings was crossed by a bridge used as a tramway, about eight feet in height from the level of the rails, on which rested part of the head gearing and supports necessary for the working of the plaintiffs' colliery.

An empty waggon, or one loaded in an ordinary way with coal, could pass safely and clearly under this bridge, and waggons were occasionally shunted under it by the defendants, but when they did so it was complained of by the plaintiffs, on the ground that waggons so left blocked up a public highway called Fleet Lane which crossed the siding between the railway and the bridge.

At the plaintiffs' colliery it was the ordinary custom to leave off work at 12.30 P.M. on Saturdays and to resume at 6 A.M. on Mondays. About 2.30 P.M. on Saturday, the 25th of January, 1873, the defendants brought three or four empty waggons of the plaintiffs, together with a disabled waggon of the plaintiffs loaded upon another waggon, and marked "home for repairs," along the Parr Branch, and shunted them on to plaintiffs' siding, and left them there.

The height of the waggon, with the disabled waggon loaded on it, was about eleven feet in all, too high to pass under the bridge before mentioned.

The disabled waggon loaded up on the other, and the two or three others, were known to a person left in charge of the plaintiffs' works during the absence of the workmen at 2.30 on Saturday, the 25th of January, to be on the siding, and were left standing there during Saturday afternoon and up till and during Sunday night, the 26th, and it was known to him that a number of waggons would arrive during that night.

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On the night of Sunday, about 12.30, the defendants brought up on their line a train of forty-eight empty waggons of the plaintiffs, and proceeded to shunt them on to plaintiffs' siding; but the night being very dark, the defendants' servants engaged in shunting did not notice that the loaded-up waggon was different from any other waggon in height.

The train of waggons was slowly backed along the siding, and coming against the waggons which had been left by the defendants on the previous Saturday, pushed them over Fleet Lane towards the bridge, so as to cause the loaded-up waggon to strike against the bridge, which checked the further progress of the train.

On touching the bridge the engine-driver felt an obstruction, and not having got all the waggons off the main line, which it was his duty to do, and believing the obstruction to be caused by a break, he, to use his own words, drew back the engine and gave another jamb up; by this he gave such a momentum to the engine that the loaded-up waggon knocked down and carried away the bridge and head gearing, which was the accident complained of by plaintiffs.

A guard in charge of the empty waggons was, whilst they were being shunted as above described, seated on one of the waggons about the middle of the train.

The plaintiffs had also a siding on the east side of the defendants' line, on which empty waggons were from time to time shunted by the defendants, and on which the waggons brought on the Sunday night might have been put.

At the trial the contention on behalf of the defendants was that there was no negligence on their part, and even if there were, there was contributory negligence on the plaintiffs' part, inasmuch as, knowing that waggons might arrive at any hour of the day or night, and that in fact they were expected to arrive on the night of the 26th, it was their duty to have removed the loaded-up waggon and to have the sidings clear; the plaintiffs, on the other hand, contended that there was no such duty on their part, and that there was no evidence of contributory negligence.

[The case on the appeal then set out a shorthand writer's note of the summing up of Brett, J., which is omitted, as not being required for the purposes of this report.]

In reply to questions left by the learned judge to the jury, they replied: "We think there was contributory negligence on the part of the plaintiffs." And the learned judge thereupon directed the verdict to be entered for the defendants. A rule for a new trial having been made absolute, as before stated, the defendants appealed.

Aspinall, Q.C. (*McConnell* with him), for the defendants. The decision of the Court below, that there was no evidence of contributory negligence, is wrong. The accident was caused by the plaintiffs' omission to remove the loaded truck. If this truck had not been allowed to remain on the siding, nothing which the defendants' servants did would have caused any mischief. He cited *Davies* v. *Mann* (1); *Tuff* v. *Warman* (2); *Walton* v. *London and Brighton Railway Company.* (3)

Herschell, Q.C. (*Baylis* with him), for the plaintiffs. The decision of the Court below was right. The defendants, having left the loaded truck after working hours on the plaintiffs' siding, had no right to assume that this truck had been removed by the plaintiffs. There was no obligation on the part of the plaintiffs to remove it during non-working hours, and the defendants had no right to throw on them the burden of taking extraordinary measures. Even assuming that the plaintiffs ought to have removed the loaded-up truck, the defendants ought not to have forced it against the bridge, in the manner they did, without ascertaining the cause of the obstruction. The plaintiffs were not bound to anticipate that the defendants would use the siding as they did, without ascertaining that it was clear. The defendants have not shewn that they were in the habit of leaving disabled waggons on the siding, which they had a right to expect would be taken away. Secondly, there was a misdirection at the trial, and the law, as laid down in *Davies* v. *Mann* (1), was not sufficiently explained to the jury. He cited *Bridge* v. *Grand Junction Railway Company* (4); *Dimes* v. *Petley.* (5)

Aspinall, Q.C., in reply.

(1) 10 M. & W. 546.

(2) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263; in error, 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 322.

(3) 1 Har. & Ruth. 424.

(4) 3 M. & W. 244.

(5) 15 Q. B. 276; 19 L. J. (Q.B.) 449.

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BLACKBURN, J. In this case the rule in the Court below for a new trial was made absolute on two grounds, the principal one being that the Court thought that there was no evidence of contributory negligence, by which I understand any neglect of duty or conduct on the part of the plaintiffs sufficient to disentitle them to recover in this action; the second, that, assuming that there was any such evidence, the case was not properly left to the jury. The majority of the Court, I think, are of opinion that on neither ground was the Court below right.

I will first state the question, which is really the important one, whether there was evidence which, if properly left to the jury, would take from the plaintiffs the right to recover, assuming that the defendants were guilty of negligence. I believe that there is no dispute, and that for many years there has been no conflict of authority as to what really is the law upon the subject. I think that all the cases uniformly agree in this, that though the plaintiff, or the person who complains of negligence, may himself have been guilty of negligence, and may have put his property in some place where it is exposed to danger, though leaving it there was negligence on his part, yet that does not disentitle him to recover for the consequences of negligence on the part of other persons, which has injured him or his property. A man is bound, when he puts himself in a place where he knows other persons are coming, and are in the habit of coming, not only for his own safety, but for that of his neighbours, to take reasonable care of himself and of his property; but, whether he does this or not, it does not relieve anybody else who comes there from the duty of also taking reasonable care.

In the case of *Davies* v. *Mann* (1), where a fettered donkey was lying on a highroad, and a man came driving furiously past in a way which, if it had been an unfettered donkey or a man, would have made him liable to be run over, it was held, although no doubt the accident could not have happened if the donkey had not been there, though no doubt it was negligence on the part of the owner of the donkey to leave it fettered there without any assistance, yet this did not excuse the defendant for driving over it, and did not disentitle the owner of the donkey to recover damages.

(1) 10 M. & W. 546.

So in the similar case of a drunken man who might be lying on the highway, if anybody carelessly driving on the road drove over him, he would have to pay damages, because the drunken man did not lose his right of action by his negligence.

It comes, therefore, to this: was there evidence here which shewed that the plaintiffs were guilty of negligence, and that the negligence was directly a part of the proximate cause of the accident? I think there was. We must look at the statement of facts. In the first place, this high waggon, loaded with a broken waggon, is put on the siding on the Saturday afternoon. There it stood, and the plaintiffs had possession of it. They knew perfectly well that the course of business was that the railway servants came in the night and in the dark, and brought the waggons to this very same siding; and they also knew, for I think this appears to be pretty clear, that when other waggons were standing there they shoved them back, in order to bring others to take their places; and they must have known that a high waggon of this sort, if it were driven back so far as to go under the bridge, would be liable to beat against the bridge, and thus to cause mischief. This being the state of things, the first question seems to be, was it negligence on their part to keep that high waggon standing there from the Saturday night until the Monday morning? because that is what they did, the accident happening on the Sunday night, in the dark. I think it was negligence, and there was an absence of reasonable care on their part, knowing that the railway company's servants were likely to come there and send their waggons there.

Now I think it was carefully left to the jury, and they were properly told that the question was whether the plaintiffs had done what a reasonable man would have done, or omitted to do something that a reasonable man under the circumstances would do. If so, they were guilty of negligence.

The question was asked, would a reasonable man, under the circumstances, have left that high waggon there (because it was its height which made it dangerous), standing, as it did, for thirty-six hours without removing it? It is true that it was after working hours, and after the workmen had left the colliery, but would a prudent man have removed it from the siding? The question was clearly one for the jury, and the jury have rightly answered it by

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finding that there was negligence. But then it does not follow that the defendants might not be liable. The strongest evidence of their negligence is this, when they were pushing the waggons into the siding and felt a stoppage, which, as we know, was the high waggon coming against the bridge, they concluded that the bridge was high enough to pass under, took back the engine and then brought it with such an impetus, that the trucks were shoved forward against the bridge, and brought it down. This was certainly evidence for the jury of negligence on the part of the defendants, and if they thought that this negligence, notwithstanding the fact that the high waggon had been left there, was the proximate cause of the accident, the defendants would have been responsible. But that question was substantially left to the jury. It was pointed out in terms sufficient to bring the question before them, that there was no negligence on the part of the defendants in what they did, unless they knew the high waggon was there. "Do you think," says the judge, for it is put in so many words, "that when the defendants knew, or rather the defendants' servants who left it there on the Saturday night knew, that it was there, that it was negligence in the defendants' servants, and consequently in the company, not to leave warning to the other men that came up, to tell them, "There is a high waggon up there, look out for it." It is left to the jury whether that is negligence on the part of the railway company. Then it is left to them. "Was it negligence on the part of the other servants of the railway company to push up the waggons in this way without sending down a man to see where the obstruction was?" All this amounts to saying that the negligence on the part of the defendants depends upon this, whether or not they were aware there was this high waggon, or ought, as reasonable men, to have anticipated that possibly it was there. For if not, there is nothing on their part but what takes place in the ordinary course of business. If that is so I venture to say it is not a question about words, but there was a state of things which would disentitle the plaintiffs to recover, because I think it would appear that not merely the negligence of the plaintiffs in leaving this high waggon standing there was a causa sine quâ non, a cause without which the thing would not have happened, for it clearly would not have happened unless the

high waggon had been standing there, but also that if the mischief would not have happened but for that negligence on the part of the plaintiffs, and all that was imputed to the defendants was dependent upon this, whether or not they ought to have supposed that the high waggon was there, then, if the defendants had no reason to believe that it was there, they were guilty of no negligence at all, and consequently the plaintiffs' negligence in leaving it there was the proximate cause of the accident, and not merely the causa sine quâ non. The distinction between this and *Davies* v. *Mann* (1), and that class of cases, is that though the donkey, which was left there, was the causa sine quâ non, yet the defendant was guilty of negligence in driving furiously and in a way which would have been negligent even if there had been no donkey there, because he had every reason to expect that other people would come there, and even if an unfettered donkey had been there, although it might have got out of his way, yet it would have been liable to be run over, and therefore the defendant was guilty of negligence. Then the question comes to be, could the plaintiffs avoid the consequences of the defendants' negligence? This being so, I cannot agree with the Court below, that there was no evidence of such a state of things as to disentitle the plaintiffs to recover.

Then comes the question whether the judge gave a sufficient direction to the jury. Now I must disclaim the idea that any learned judge is bound to follow a particular form of words; the direction should be such as to convey to the jury the real question. [The learned judge then referred to the direction of Brett, J., and expressed his opinion that it was sufficient.] The result is that the judgment of the Court below will be reversed.

MELLOR, J., concurred.

LUSH, J. I am of the same opinion. I would only add, as to the first ground, that the Court below came to the conclusion that there was no evidence of contributory negligence to be left to the jury, by assuming that it was out of the power of the plaintiffs to remove that waggon between the time when it was left there on the afternoon of the Saturday, and the Sunday night at the time of

(1) 10 M. & W. 546.

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the accident; but there is no evidence in the case to warrant any such assumption, and I am unable to see, as matter of law or as matter of experience, that it was impossible for the waggon to be removed. If it could, it ought to have been. This was a question for the jury, but my Brother Bramwell in his judgment takes it for granted, and it is the foundation of his judgment, that it was not practicable to remove the waggon between the Saturday afternoon and the Sunday. Then my Brother Bramwell also thinks, I observe, that the point which arose in *Davies* v. *Mann* (1) was not put to the jury. But I think that it was. In this particular case you could not approach the question of the defendants' negligence without involving in it the supposed negligence of the plaintiffs. Had the waggon not been there, the accident would not have happened. The supposed negligence is only in shoving on the train without ascertaining whether or not a high waggon was in the way; whether they should have ascertained that it was there, or known it was there, or sent a man down to know what was the matter before they shoved on the other waggons, were all questions for the jury.

My Brother Grove, who is obliged to attend an official appointment, desires me to say that he concurs in this judgment.

BRETT, J. I can only say that I cannot see that what I did was wrong, though I have no doubt that what I did might have been much better done.

DENMAN, J. I cannot come to the same conclusion as the rest of the Court. I feel convinced that I must be mistaken, because I find that all my learned Brethren differ from me, still it is my duty to give the ground of my opinion. I think on both grounds the judgment of the Court below is right. With regard to the question of whether there is evidence of contributory negligence here which should disentitle the plaintiffs to a verdict, I do not found my view on the ground that there was not some evidence of what might be considered negligence on the part of the plaintiffs. I think that it was quite open to contend that the plaintiffs, through their servants, were guilty of negligence in leaving that

(1) 10 M. & W. 546.

waggon unattended to during so long a time as they did, but I do not think that every sort of negligence of which a plaintiff may be guilty is necessarily contributory negligence such as would deprive him of the right to recover. I think cases may be easily put in which no one would doubt that though there was negligence, it was so far removed from anything to do with the cause of the accident, that the plaintiff would not thereby be prevented from recovering; and I cannot help thinking, where it is perfectly plain that the accident happened owing to some definite and affirmative act on the part of the defendant constituting negligence, that then it will not do to say that the plaintiff was guilty of some act of negligence without which the accident would not have happened, because without it the thing to which the accident happened would not have been in that place. Therefore I think that in every case, before the judge leaves the question of contributory negligence to the jury, he ought to be satisfied that there is something which might or could be reasonably held by them to be, properly speaking, the cause of the accident. Now undoubtedly this truck would not have been injured, or have injured the bridge, if it had not been there where it was placed by the defendants, and left without any interference on the part of the plaintiffs during many hours. But it strikes me, upon the evidence, that it is as clearly made out as anything can be that the accident was not, in any common sense view of the matter, due to that, but that it was due to an affirmative act on the part of the defendants which we must take to have been found by the jury, because the question of contributory negligence does not arise until the negligence of the defendant is supposed to have been settled and found by the jury. The negligence, from which the accident happened, was charging the bridge with a quantity of trucks at the end of which was the truck in question, and when it was found that the trucks came to a standstill, not being content to stop and look to see what was the cause of the stoppage, but pushing violently with an engine the whole train with that unknown stoppage at the end, and so throwing down the bridge. It appears to me, therefore, that though there may have been some negligence on the part of the plaintiffs, it was not negligence which in any sense caused the accident, but that it was entirely the affirmative act of the defendants' servants, in

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charging the bridge as they did; and therefore, although there is some evidence of negligence, there is nothing that ought to be considered in point of law as evidence of contributory negligence.

The Court below, though they did not put the case exactly in so many words as I put it, seem to have put it in substance the same way. They did no doubt rely upon the fact that during the intermediate time nothing could have been properly done. At all events, it is sufficient to say that there is no evidence, as it seems to me, of anything unlawful or wrongful on the part of the plaintiffs in leaving the waggon there between one day and the other. Then, secondly, the question arises whether the jury were misdirected. [The learned judge referred to the summing-up, and expressed his opinion that it did not sufficiently explain the law (as laid down in *Tuff* v. *Warman* (1)) to the jury.] I agree, therefore, with the judgment of the Court below.

ARCHIBALD, J. I agree in the opinion of the majority of the Court. The rule below was made absolute on the ground of misdirection. The misdirection, as I understand the case, appears to be that there was no evidence of contributory negligence on the part of the plaintiffs, and that the learned judge ought to have told the jury so; but on the argument here, not only is that point taken, but it is also insisted that the learned judge failed to explain sufficiently to the jury the effect of contributory negligence on the part of the plaintiffs. Now, I quite agree with the authorities cited, that it is not every species of contributory negligence on the part of the plaintiff (at least it is not under all circumstances) which will excuse the negligence of the defendant; and although there may be negligence on the part of the plaintiffs which does in fact contribute to the accident or the mischief, yet, if the defendant might by reasonable care and caution have avoided it, he will nevertheless be liable. I think the question has been in substance sufficiently left to the jury and explained to them by the learned judge.

I also agree that there was in this case evidence to be submitted to the jury of negligence on the part of the plaintiffs. Adopting

(1) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263; in error 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 322.

that view, there comes the question, what was the conduct of the defendants in the case? If they had rashly, without any care at all, driven this train of empty carriages into the siding, and recklessly and carelessly driven the high carriage against the bridge, I can quite understand circumstances under which they might be answerable, although there was negligence on the part of the plaintiffs in leaving the carriage there. But the question would be, what was the conduct of the defendants? Did they take such measures and precautions as they ought to have taken, assuming the existence of negligence on the part of the plaintiffs? That is the exact question which the learned judge left to the jury. He called their attention to the question of what ought to have been done in the exercise of ordinary care, and what should have been the conduct of the defendants on the occasion. [The learned judge proceeded to comment upon the terms of the summing-up.] I think, therefore, that there was no misdirection, and that there was evidence for the jury of contributory negligence, and that upon both grounds the judgment of the Court below ought to be reversed.

Judgment reversed.

Attorneys for plaintiffs: *Sharpe, Parker, & Co., for Peace, Wigan.*

Attorney for defendants: *R. F. Roberts.*

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Feb. 9.

[IN THE EXCHEQUER CHAMBER.]

THORN *v.* THE MAYOR AND COMMONALTY OF THE CITY OF LONDON.

Engineering Contract — Plans and Specification — Mode of Construction — Impossibility of Execution in Mode specified—Implied Covenants.

The defendants being about to construct a bridge across a tidal river, employed an engineer for the execution of the works, and specifications and plans and drawings of such works were prepared by him. The defendants then issued an advertisement inviting tenders for the execution of the works comprised in the specification, plans, &c. By the specifications the foundations of the piers were to be put in by means of caissons, as shewn in a drawing; the form and dimensions of the ironwork and size of rivets to be as shewn on the drawing, or to be thereafter supplied by the engineer, &c. By the deed, after reciting the specifications and tenders, the plaintiff covenanted that he would complete the work, according to the terms of the specifications, within three years. Power was given to the defendants' engineer to alter the mode of executing the work, and it was provided that if additional expense was incurred by such alteration, the plaintiff was to receive compensation, to be fixed by the engineer.

The plaintiff commenced the work, and after he had incurred great expense, it was found that the work could not be executed by means of the caissons in the manner specified, and by the directions of the engineer a new mode of putting in the foundations was carried out. The plaintiff having brought an action to recover the value of the work which was thereby thrown away:—

Held, by the Exchequer Chamber (affirming the decision of the Court below), that no warranty by the defendants that the work could be executed in the manner described in the plans and specifications, was to be implied.

Per Blackburn and Mellor, JJ., that the mode of laying the foundation by means of caissons was not part of the contract, but only a mode of carrying it out, which the engineer had power to alter.

Per Brett, J., that this mode of laying the foundations was a substantive part of the contract, and that the plaintiff could only be required to pursue a different mode under a new contract.

Affirmed by H. of L. 1 App. Cas. 120

ERROR upon a judgment of the Court of Exchequer in favour of the defendants (1), where the facts are fully stated.

Feb. 8. *Benjamin, Q.C.* (*Littler, Q.C.*, and *J. W. Batten*, with him), for the plaintiff, repeated the arguments urged in the Court below.

Giffard, Q.C. (*Thesiger, Q.C.*, and *Mackenzie*, with him), for the defendants.

(1) Law Rep. 9 Ex. 163.

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Feb. 9. BLACKBURN, J. In this case, which was argued yesterday, we are all of opinion that the judgment below ought to be affirmed, though I must not say that we are all agreed as to the reasons for affirming it. I have reasons of my own which, I believe, are those of the majority of the Court, but which may be qualified by what my learned Brothers may say when they have heard my judgment.

The plaintiff, who is a contractor, entered into an agreement by a formal indenture, in which there are various covenants. It begins by reciting, as the fact was, that there had been previously issued on behalf of the corporation specifications, in which they described the kind of work for which they were inviting tenders, and the indenture contains a covenant on the part of the plaintiff that he would complete the work; not making the specifications part of the contract, but that he would complete the work in the manner described in the specifications, and do the work according to the terms of the specifications; and there is in the indenture a condition that if the mode of doing the work is altered, which it may be, and power is given to the engineer to alter it, the contractor shall do it in that altered mode, and that if in consequence of the alteration he may have incurred any additional expense in doing the work (of which the engineer is made sole judge), he shall receive compensation, of the amount of which the engineer is also to be sole judge. There is also a further term in the covenant that he is to execute the work in three years, and that if he delays the completion of the work beyond that time, he is to forfeit 1000*l.* a month for every month's delay. But there is a further provision, that if the engineer, who is again made sole judge, thinks that the delay has been in consequence of some matter, which is, inter alia, by no fault whatever of the contractor, in that case also the engineer, as sole judge, may give further time, and doubtless would do so. Such is the contract, and there is no express covenant whatever that the specification, and the mode mentioned in the specification, shall be one that is practicable. Now the question that arises comes to be this: when we look at the specification we find that the work to be done was to build a bridge—Blackfriars Bridge—across the Thames, a tidal river, as we all know, and it is provided for in the specification,

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and pointed out that the foundations are to be laid in a particular way, which I need not further allude to except to say it was quite practicable and successful, and they were ultimately laid. The foundations to the piers were to be laid to the depth of some feet—the precise number does not matter—below the level of low water, and of course, the tide rising and falling, they would be twenty feet or more below the top at high water. Now, in that state of things, in order to build the piers, it would be, if not indispensable, at all events convenient, to keep the water out around them, so that the workmen might work, in carrying out the work of building the bridge, in a place like dry land, and the well-known mode of doing this would be to have a coffer-dam. This coffer-dam would probably, though it is not expressly stated in the case, be an expensive work, and would certainly occupy part of the room in the river, and as the bridge was to be made under the control of the conservators of the Thames, it was an object to avoid interfering with the water-way more than was absolutely necessary. The specification discloses, and the engineer had doubtless arranged, with a view to what was proposed, that the piers were to be built in this way (I may say briefly I do not pretend to accuracy in it): caissons seven feet in height were to be sunk, between which caissons, when put down, there were interstices, which were made water-tight by means of piles, which would make water-tight compartments seven feet high. On the top of that there was to be second, third, and fourth sets of caissons, which would make the water-tight compartment twenty-eight feet high, and which would bring it above the top of the water at high water; and it seems that the proper thickness and the nature of the iron, and everything in those caissons, is mentioned in the specification, so as to shew what kind of caissons they were which were intended to be put down, and it appears, and I presume (though not being an engineer I do not say it of my own knowledge) that a person looking at it would understand it was contemplated, when this water-tight compartment was made of the height of twenty-eight feet above the foundation below, that the water might be pumped out once for all, and that then there would be a water-tight compartment twenty-eight feet high, free from water, requiring no further pumping than such as might be required in consequence of any small

leakage or rain that might fall, not having the tidal water of the Thames coming into it, and then when once that was done the workmen were to build within that dry water-tight compartment a pier, exactly as if it were being built on dry land. It would be in lieu of a coffer-dam, and perhaps it might be called a coffer-dam, only not made in the way a coffer-dam usually is, and I apprehend also—though this, again, is not stated in the case before us—that this mode of doing the work by means of caissons was not the usual and ordinary way, but was the way devised on this particular occasion, and which it was expected by the engineer would sufficiently answer the purpose which was in the contemplation of the parties. Now when this came to be put into operation, it turned out, either from having under-estimated the force of the tide, or, what is more likely, from having over-estimated the strength of the piles and materials, but for some reason or other which is not explained, when this was done, and it came to be high water, the water broke in, and the workmen could not build in the way which was anticipated. This was clearly no fault of the contractor; and the engineer, after having tried to remedy it in various ways, finally removed the two top caissons, so as to make the water-tight compartment only fourteen instead of twenty-eight feet high, and the consequence was that some of the work done by the contractor was thrown away, for although until the tide had risen fourteen feet there was less than a pressure of fourteen feet of water on the side of the caissons, and it was dry enough, as soon as the tide rose above fourteen feet it filled up the interior of the caissons, and, as is quite obvious, the workmen could not work, but had to wait until the tide fell again, and then, the water being pumped out, they could proceed with the work again. The case states, and it is again obvious, I think, from the statement made, that the consequence of this was that the contractor was put to additional work, labour, and expense—how much is not stated—and it is not material whether 100*l.* or 100,000*l.* would be the compensation, for that is immaterial with regard to this point of law. There was no doubt expense; further, there was delay—it is not stated how much—and, as I said before, it is immaterial for our consideration whether this was to be measured by tens or by units.

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Now the question arises whether, under the contract as entered into, there was anything which the corporation had made a part expressly or impliedly of the contract which makes them liable to compensate the contractor for this additional delay. It seems to me—I am now speaking for myself, for I believe at least one member of the Court does not agree in what I am going to say—that the caissons round the pier were but a mode of carrying out the work; the thing to be done was to build the piers. The mode pointed out in the specification, and the mode in which the contractor was to proceed in the first instance to do the work, was by means of these caissons, but when it was done they were to be removed. I think they were like the scaffolding of a house—not part of what was to be done, but a mode of carrying it out; and taking it in that way, and supposing it to be so, it would follow that the contractor was bound to do the work in the altered mode which the engineer pointed out, having his recourse for the extra expense to the provision in the contract by which the engineer was to allow compensation for the extra expense, the engineer being sole judge of what it should be. As to whether the contractor was entitled to say, "I will not go on with this mode of carrying out the work," I think he was not so entitled; but supposing him to be so entitled, he did not rely on any such right; he treated the matter as if the engineer had a right to order him to do the work in this altered mode, and he did do it in this altered mode, and as far as regards extra expense the engineer, Mr. Cubitt, has given him compensation. We have no right, had we the materials before us, to review the engineer's decision on this subject. We have not the materials; and he awarded compensation which I have no doubt he thought fair, just, and liberal, and which I hope was so. So far as that is concerned the contractor got paid. But the delay is a separate thing. If there is any contract, express or implied, by which the corporation warranted to the plaintiff that the mode pointed out in the specification, and on which he made his tender, could be carried out—if there was any such contract, express or implied, I say it has been broken, and the damage arising in consequence of delay from this would have to be assessed, and the plaintiff would be entitled to recover.

Now when you look at the contract, it does not embody the conditions on which Mr. Benjamin in a great measure rested his argument (they are not made part of the contract), all that is done is to refer to the specification for the mode in which the work is to be carried out, but certainly in the contract itself there is no such express warranty, and the question in the case is, are we to imply such a warranty? I think if the case were, which I do not think it is, that the building of the bridge—the thing to be done, in the mode mentioned in the specification—was in fact impracticable, I do not think it would make any difference, but at the same time I should want to consider the matter before I said whether it would make a difference. It seems to me that unless you can find an implied contract that the mode of building it described in the specification is reasonably practicable, there is no case for the plaintiff. Now, taking that view of it, let us see whether there is any ground for implying such a contract. It is true that the contractor, looking at this and knowing it—and we must assume that the contractor, or those who are acting for him, have competent knowledge of the mode in which bridges are generally built—if he saw a new thing substituted for a coffer-dam which had not been tried before, and had said, "I think this will probably work well, but it is a new plan which has never been tried; a new plan will sometimes go wrong," and had gone accordingly to the corporation, or those who represent them, and said, "I think this will probably work well, and I have made my estimate accordingly; but it may not work well, and therefore I request you to give me an indemnity, in case the mode should prove to be impracticable, and so cause delay and expense;" if he had done that, and they had answered, "We are so convinced that this is all right, that we will warrant this new plan will work practically;" if they had said that, and had embodied it in the contract in express terms, then the plaintiff would be entitled to recover; but there is certainly no such express warranty. If, on the other hand, the corporation had said in express terms, "We will warrant nothing, we think this mode will do. If it proves ineffectual, and you are put to damage and expense, you will have, by the agreement which is proposed to be drawn, the compensation which the engineer thinks fit to allow you, and anything

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more we will not warrant at all," and had put into the contract an express negative of all warranty, it seems quite clear that the plaintiff would have had no shadow of a case at all. The question therefore comes to be,—there being no express statement one way or other in the contract, which states on the face of it that the mode of doing the work had been previously pointed out by the specification prepared by the corporation,—are we to say that there was any implied warranty to the effect that that mode of doing it was practically sufficient? If so, the plaintiff would be entitled to recover.

Now, certainly, when you have a formal document under seal without a warranty in express terms, we should not be likely to imply a warranty unless there is the clearest reason for it. Mr. Benjamin admits that he is unable to find any analogous cases in which a warranty has been implied under circumstances similar to these; and it seems to me that the burden is on the plaintiff to shew that a warranty is fairly to be implied. I may say that, far from seeing any reasons, legally or morally just, from which we should imply it, it seems to me that the convenience and the right of things are all on the other side. As was well expressed by Mr. Baron Amphlett, on the occasion of the consideration of this case by the Court below, the contractor might, if he doubted whether the scheme was practicable, have asked the corporation for an express stipulation, or he might have declined to enter into the contract. He has done neither. He has chosen rather to act on Mr. Cubitt's reputation, or his own notions as to its being practicable, and has asked for nothing. It seems to me that if we were to introduce a warranty, we should be putting something into the contract which not only the parties did not put in it, but which they did not intend to put in it, and which, if it had been proposed to them, would probably have been refused; or, if they had agreed to any at all, it would have been a warranty considerably modifying any provisions as to how the work was to be carried out. Taking that view of it, I agree with what is the substance of the judgment below, that the plaintiff cannot recover on an implied warranty, there being no express warranty in the contract, and consequently the judgment of the Court below must be affirmed.

MELLOR, J. I am of the same opinion, and concur generally in the reasons given by my Brother Blackburn. I cannot think we are at liberty to infer from the circumstances of the case an implied warranty that the plans and specifications prepared by Mr. Cubitt on the part of the corporation were such as really could be executed. The contractors were at liberty, if they pleased, to employ their own engineer to see whether or not these plans were such as could be executed, and executed within the time limited. Both of the parties were, I think, on equal terms. I think it would be a dangerous thing if, under circumstances like these, where there are provisions with regard to delay on the one side, and there is no such provision on the other, we were to imply any such stipulation. Now the claim here is not for the extra expense to which the parties were put in executing the works; that has been settled. The claim is that they were so delayed in the execution of the works by reason of the failure of the plan, that their capital, machinery, &c., were kept idle. I can only say that if the contractor is to be entitled to have this made good by the corporation, he must give us stronger reasons than he has for implying a warranty.

LUSH, J. I also concur in the opinion of my learned Brothers, that the judgment of the Court below ought to be affirmed; and I do so on the short ground that there is nothing in the contract which shews an intention on the part of the corporation to warrant the efficiency of the mode described of keeping out the water, and so enabling the contractors to go on with the work of building up the piers of the bridge. It is admitted that there is no express contract of the kind, and there is nothing whatever, in my opinion, to justify the Court in implying any such contract; therefore, to impose such an obligation on the corporation would be to introduce a stipulation into the contract which the parties, either from design or inadvertence, it does not matter which, omitted; and we should, by so doing, introduce a new term into the contract, which the Court certainly is not competent to do.

BRETT, J. I have come to the conclusion that the plaintiff cannot recover in this case, and that the judgment of the Court

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below ought to be affirmed; but I differ from some of the steps by which the same conclusion has been arrived at by my learned Brothers. Having no hope of altering their determination, I feel bound to state the grounds on which I think the judgment ought to be affirmed. I entirely agree that when a specification and plan are offered for tender by advertisement, they are at that time merely an offer, and there is no contract until the tender has been sent in and has been accepted; and if a contract or deed is then drawn up in writing, the specification and plan become no longer part of the contract; the only contract which can be considered by the Court is the written contract, that is to say, in this case, the indenture. Then the question is, whether we can imply in this indenture a particular covenant. I think we have a right so far to consider the specification, plan, and tenders, as to take notice that the contract is made by means of such a process; and the question must be whether the proposed covenant can be implied in the indenture from the fact that the indenture was arrived at by means of the specification, plan, and tender. Now, this being so, I, although with great hesitation and deference, cannot come to the conclusion that in this case the substance or the subject-matter of the contract was merely the building of a bridge, and that the making of the caissons was a mere mode of dealing with the subject-matter of the contract, as if it were the scaffolding which is used for the purpose of building a house. If that were so I should not expect to find details of the mode in which the caisson was to be constructed. I do not recollect a contract, where the subject-matter being the building of a house, and where the scaffolding was to be erected for the purpose of building it, in which the exact method of making the scaffolding was in the specification; though it might be generally mentioned, still, if a mere mode of building the house, and the house were the subject-matter of the contract, I should say that the tenderor would leave a very considerable latitude as to the mode in which the contractor should deal with the scaffolding; but here the very manner and method of making a caisson is one of the most particular parts of the contract. The caisson is an iron caisson, and as a matter of business and business knowledge, I should say that an iron caisson, built according to these specifications, was a wholly different thing

from that which is called a coffer-dam, which, as I understand, is a thing made of timbers, and it is so wholly different, that it would be practically made and constructed by people of wholly different trades. Therefore, considering the mode in which the caisson is described in the specification, considering the practical difference between an iron caisson of this kind and a coffer-dam, although in in some senses they are analogous and alike, and certainly are made for the purpose of performing the same ultimate function, I cannot think that the making of the caisson was a mere mode of building the bridge, for I think it was a substantial part of the contract, and one of the subject-matters of the contract. My view of the contract, therefore, is that it is to do successive things in a particular order, first, the making of the caisson, and after that the foundations of the bridge were to be built, and then the bridge was to be made and based on those foundations. Now there is nothing in the contract itself which would bind the plaintiff to make any part of the bridge before the caisson was completed, but practically I should say that the bridge must have been prepared. Considering the time in which the whole structure was to be finished, it would be absolutely necessary, I should think, on the plaintiff to have the bridge prepared and ready to be put up before the caissons were finished; at all events, it was right and reasonable that he should have them ready.

Now then comes the contract. I think the miscalculation was, in the first place, the miscalculation of the corporation. The engineer, Mr. Cubitt, was the engineer of the corporation, and I think the miscalculation was their miscalculation, and, therefore, the case must be considered precisely as if the contract had been made by Mr. Cubitt on his own behalf, and he had made the miscalculation. I think, further, that it was such a miscalculation as certainly prevented the plaintiff from earning the advantages which he was intended to have under and according to the contract. Certainly the miscalculation goes to that extent. I doubt very much whether it is not such a miscalculation as prevented the whole work being carried out at all under or according to the contract. I cannot, as at present advised, subscribe entirely to the view expressed by my Brother Blackburn, which is, that under the clause in the contract which enabled the engineer to make

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alterations, when those caissons failed in the mode in which they did fail, the engineer was able to substitute another method which would carry out the same result, and that the plaintiff was obliged to carry that out, for if that be the true view of the matter, it seems to me that the engineer might have directed that coffer-dams should be made, which, as I have already ventured to state, seems to me a radically different thing, and which requires a knowledge of a different kind of trade, and I cannot think that the plaintiff would have been bound, upon the order of the engineer, to abandon the making of the caissons in iron, and to adopt, upon the engineer's order, the making of the coffer-dams in timber. I am, therefore, inclined to think that the miscalculation of the corporation not only prevented the plaintiff from earning that which he was entitled to earn under the contract, but prevented the carrying out of the contract according to its terms, and the only way, therefore, if the plaintiff went on with the work, in which he could proceed must have been by a new contract, either expressed or implied. I must, therefore, deal with the case as if, upon discovery of the impracticability of the caissons, the plaintiffs was not bound to proceed with the contract at all; and, therefore, the case comes to be the same to my mind, except for the purpose of the particular kind of damages claimed, as if the only subject-matter of the contract had been the caissons, and as if the miscalculation of the corporation had prevented the plaintiff from carrying out the contract or earning profit under it.

Now, upon this state of things, Mr. Benjamin argued that, by reason of the wording of this contract, there was an implied covenant as to the practicability of these caissons, relying upon the principle expressed in the proverbial phrase, "Expressio unius est exclusio alterius." Now, inasmuch as the express negatives of warranty on which he relied (1) are negatives of perfectly independent covenants, I cannot think the negative of a warranty in these cases is such as enables us to apply the affirmative warranty which he desires to introduce into this contract. It seems, therefore, to me that the only way in which a contract could be implied is to say that in all works of this kind which are entered into by means of specifications and plans advertised, and upon which

(1) See clauses 36 and 54, Law Rep. 9 Ex. at p. 165.

tenders are requested, there is an implied warranty on the part of those who issue the specification and tender that that which they desire to have done is a practicable thing; and nothing, it seems to me, can be more important than such a consideration. It is a vital consideration in a business of the largest kind. I cannot think that such a covenant can be implied under such circumstances. I have once before endeavoured to express what I deemed to be the only principle of law on which Courts can imply a contract between parties, and I endeavoured to enunciate that in the case of *Daniels* v. *Harris*. (1) What seems to me to be the principle is this. Whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business must either have been latent in, or palpably present to, the minds of both parties when the contract was made—and unless you can say that the covenant which you desire to imply must have been so present to the minds of both, that if they had been called upon to express it anybody of ordinary intelligence or knowledge of business must have concluded that both would have expressed it in the desired form—I think the Court has no right to imply such a contract. Therefore the question comes to be, whether we can say of this covenant that, if both parties had been called upon to express their meaning according to the view of every person of ordinary intelligence and knowledge of business, they would have come to the conclusion that such a covenant must exist. Upon this point I think the judgment of Baron Amphlett in the Court below is most valuable. The question proposed is whether, in a specification, the person who is called upon to tender has a right to assume that the work is a practicable work, or whether he is bound himself to inquire.

Now it may be strongly argued that in one sense he is justified in relying on the practicability of the suggestion of the author. I cannot say that every person of ordinary intelligence and knowledge must come to the conclusion that the specification and plans are merely suggestions for an offer. But he who has to tender may offer or not at his pleasure. He certainly has to consider whether the proposition will be a profitable one to him. I think he must also go on, or it may be said he is called upon to go

(1) Law Rep. 10 C. P. 1, at p. 8.

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on, and inquire whether that which is proposed to him is practicable. If the proposition is that the thing shall be done in a particular time, it does not seem to me unreasonable to say that he must consider and calculate for himself whether the proposed work can be done within the time; and it is but a step further to say that he must consider also for himself and calculate whether the work can be done at all, so as to enable him to earn the price he is to be paid. I think it may be said that both parties must make their own calculations; that if the contractor finds that the employer is proposing to him something which cannot be done, he ought not to offer to do the thing which in his mind cannot be done; and if he does not inquire into the matter or runs the risk, he must take the consequences, or if he thinks it doubtful he ought to correct the agreement by an express covenant. In the rule I have endeavoured to enunciate, though I think the impossibility of carrying out the covenant was caused by the miscalculation of the defendants' proposition, still I think that the plaintiff, having accepted the contract and entered into it, if he required the stipulation on which he now relies, he ought to have had it expressed, and we are not at liberty to put it into the contract. It is on these grounds that I concur in the decision that the judgment of the Court below should be affirmed.

GROVE, J. I am of opinion that the judgment of the Court of Exchequer ought to be affirmed, and I give no opinion upon the question as to whether the caissons in a contract for building a bridge may be likened to a scaffolding as being the mode of performing the work, or whether they are themselves part of the work contracted for. It does not appear to me to be necessary to decide that point in this case; but in my opinion, there was no warranty expressed or implied in the contract or the specification that the work done according to the specification should be sufficient and practicable. There is certainly nothing expressed on the face of the deed, and what would be the warranty if the Court were to imply a warranty from comparing all the various parts of these deeds? Very considerable variations are allowed by the deed, subject to the approval or under the direction of the engineer. To what amount of variation would the warranty extend, or how

far could certain variations be excluded from it, or, in other words, what departure ought to be permitted from the express terms of the specification? Without going minutely over the specification, there are things obviously of a substantial nature in which variations from the exact terms of the specification may be imported, and, therefore, if there be an implied warranty, it ought, in order fairly to guard the defendants in this case, to be such a warranty as would be capable of defining where it was to attach, and to what amount of variation it did not attach. I see nothing which would enable the Court by comparing the terms of the deed to imply any warranty sufficient to enable each party to know to what extent it went, or how far the plaintiff was protected on the one hand by it, or the defendants, on the other hand, pledged; so that it might be considered a reasonable and fair warranty between the parties. I think, also, there is enough in this contract, certain considerable variations being permitted, to call upon the plaintiff to say if he wished to be guarded against going beyond the specification, "I will not undertake this contract with a degree of variation of which I cannot very well see the amount, without having on the part of the defendants a proviso warranting me not merely as to the expense incurred (which is left in the specification entirely to the judgment of the engineer), but against what I may lose by the possible extension of time, as I am bound by the contract to three years." I see nothing which constitutes, on the part of the defendants, an implied undertaking that, if by any mistake in the specification or any variations beyond those given in the deed, the burden of the contract is increased beyond what was contemplated, the proviso as to three years is to be extended, the defendants paying any expense which may accrue from the extension. I do not see any warranty which by implication the Court could attach to this deed which would fairly be binding and operative between the parties, doing no injustice to either.

Judgment affirmed.

Attorney for plaintiff: *J. B. Batten.*
Attorney for defendants: *F. Brand.*

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MURPHY *v.* BOESE.

Statute of Frauds—29 Car. 2, c. 3, s. 17—Sale of Goods—Memorandum signed by Agent—Evidence of Agency.

In an action to recover the price of clocks sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller when he took the order for the goods wrote out in the presence of the defendant upon printed forms two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it:—

Held (distinguishing *Durrell* v. *Evans* (1 H. & C. 174; 31 L. J. (Ex.) 337)), that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant, so as to bind him within s. 17 of the Statute of Frauds.

Declaration,—first count, for goods sold and delivered and money due on accounts stated; second count, for not accepting goods sold by the plaintiff to the defendant.

Pleas:—First, never indebted; second, denial of agreement. Joinder of issue.

At the trial before Bramwell, B., at the Middlesex Sittings after Michaelmas Term, 1874, it appeared that the plaintiff was a merchant, carrying on business at Paris and Knightrider Street, City, under the name of Brown & Co. In July, 1874, the plaintiff's traveller, Dehorter, called on the defendant, and obtained from him an order for the supply of French clocks. Dehorter wrote the order in duplicate, upon printed headings, by means of the manifold writing process, handing the duplicate to the defendant, and keeping the original, which was on three sheets of paper. The following is the copy of the order:—

"*Ordered from Brown & Co.,*
"68, *Rue de Bondy, Paris,*
"*And* 30, *Knightrider Street.*

"*Date.* 14th July, 1874.

"*Name.* Bernard Boese.

"*Address.* Kidderminster.

"*Terms,* 2½ % *discount for cash in* 14 *days from date of invoice, or net* 3 *mo. bill. Cases free. Goods carriage free to London.*

[Here followed a specification of the articles and their prices.]

The words in italics were printed.

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A dispute as to whether the defendant should be responsible for breakage of the goods during the transit having arisen, the defendant refused to complete his contract. It was now objected on his behalf that there was no sufficient note or memorandum in writing to satisfy the 17th section of the Statute of Frauds. The learned Baron nonsuited the plaintiff, giving him leave to move to enter the verdict for 29*l.* 9*s.*

A rule having been obtained to enter a verdict for the plaintiff, on the ground that there was evidence for the jury, and that they ought to have found that the contract had been duly signed on behalf of the defendant, so as to satisfy the Statute of Frauds,

B. T. Williams shewed cause. There is nothing in this case to shew that the traveller Dehorter acted as the agent of both parties in writing down the terms of the order. The defendant's name was merely written by the traveller upon a paper with a printed heading, just as it is done in the case of an ordinary invoice. The defendant did nothing to recognise the name written on the paper as his signature. He merely received the paper, just as though it were a tradesman's bill.

Finlay, in support of the rule. There was evidence that the traveller signed the memorandum as the defendant's agent. It is now well settled that it does not matter whether the signature of the party to be charged is in the beginning or middle of the instrument: *Schneider* v. *Norris* (1); *Johnson* v. *Dodgson*. (2) It is quite enough if the defendant's name is by his authority placed in some part of the contract. Here his name was written on the memorandum under his eye, and with his permission. There is no reason why the traveller should not prepare the contract as agent for both parties. It has been held that a note made by an auctioneer's clerk of the purchaser's name in a book is sufficient to bind him, in an action by the auctioneer: *Bird* v. *Boulter*. (3) But the case is not really distinguishable from the recent decision in *Durrell* v. *Evans*. (4) There the plaintiff's factor wrote down in the defendant's presence, on a printed form, the particulars of a quantity

(1) 2 M. & S. 286.
(2) 2 M. & W. 653.
(3) 4 B. & Ad. 443.
(4) 1 H. & C. 174; 31 L. J. (Ex.) 337.

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of hops which the defendant had agreed to purchase, putting the defendant's name at the top. The defendant looked at the paper, and requested that the date might be added, and the factor altered it. It was held by the Exchequer Chamber that there was evidence that the defendant's name was put on the paper by his authority. So here, it is submitted that the fact that the defendant took and kept the paper, is abundant evidence of his consent that his name should be inserted in it.

BRAMWELL, B. I think this rule should be discharged. It has been argued that the case cannot be distinguished from *Durrell* v. *Evans* (1), but I think it may be said on the other side that it cannot be taken out of the express words of the Statute of Frauds. We are, no doubt, bound by the decision of the Exchequer Chamber in *Durrell* v. *Evans* (1), but this case is distinguishable from it, and when I remember that my Brother Crompton took part in that decision, I should wish to speak of it with the utmost respect. It was held in that case that the factor signed the paper on behalf of the buyer, and that this paper was intended to be a memorandum of the contract. I said in the Court below, not that the memorandum was an invoice, but that I could not see how the factor was authorized to sign on behalf of the buyer, but the Exchequer Chamber thought that there was evidence that the defendant meant the paper to be a memorandum of the contract. What they had to consider was, whether the paper before them had the defendant's name written upon it by an agent on his behalf. And they thought that there was evidence that the factor was the agent of the buyer, because the buyer took a share in the preparation of the contract, and said, in effect, to the factor, "Write it down in such a way." If that decision is wrong, it is wrong in deciding that what the factor was asked to do made him the agent of the buyer, whereas it might be said that the buyer was only suggesting a correction to him, and treating him as the agent of the seller. Upon this subject I will say no more.

Now here, after the order had been given by the defendant, Dehorter makes two copies of the order, delivering one to the

(1) 1 H. & C. 174; 31 L. J. (Ex.) 337.

defendant and keeping the other himself. To my mind the question comes to this: did Dehorter act as the agent for both the plaintiff and the defendant? Now if anybody, not a lawyer, were asked whether Dehorter acted as agent for any one but his master, he would say, Certainly not; it is unreasonable to suppose such a thing. Now although we are told that a lawyer's view of what is reasonable is different from that of other people—still I think that the common understanding is a good test of the real meaning of the transaction. Now, is there any reason why we should disregard the understanding of reasonable persons for the sake of avoiding the operation of the statute? I can see none. I cannot see how this traveller is the authorized agent of the defendant. After he took the memorandum away, the defendant would be at liberty to say, "I am not going to be bound by it." If he was the defendant's agent, when did the agency commence? Was he agent at the time he wrote? This will scarcely be suggested. Did he become agent afterwards by ratification? If so, you would come to this difficulty, that when the agent wrote the paper he did not profess to act for the defendant. Try it another way. Suppose the thing was done in a hurry, and the defendant had said, "The contract to which you have put my name is inaccurately drawn up, and I will maintain an action against you for your blunder." Would not the agent have been surprised at this? If it be said that the same argument would shew that *Durrell* v. *Evans* (1) was wrongly decided, I say that I do not know that this would be the case, for there they held that the defendant had made himself a party to the terms of the contract by requesting that the paper should be altered. As for the argument that the defendant is bound because the paper was written in his presence, I can only say, suppose he had been blind, or that he could not read, or that the paper had been copied out a week afterwards and then sent to him, could any agency have been inferred in such circumstances? These difficulties appear to me insurmountable. I think the rule ought to be discharged.

PIGOTT, B. I am of the same opinion. *Durrell* v. *Evans* (1)

(1) 1 H. & C. 174; 31 L. J. (Ex.) 337.

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differs in its facts from the present case in a material particular. Here there was nothing done by the defendant to shew that he constituted the traveller his agent. All that he did was to give an order, and when it was written out to take possession of it. Now is there in these facts evidence that he constituted the traveller his agent, to make a memorandum of the terms of the bargain? It is plain that there was no express authority, can any authority be implied from the facts? If it can, at what moment did the traveller become agent—after he had written the memorandum? or after the defendant had received the copy and kept it? Now, it seems to me, that none of the facts are different from what they would have been if the traveller had been only the plaintiff's agent. There is no circumstance inconsistent with his being merely the agent of the vendor. The buyer did nothing which is not done every day where the traveller acts for the vendor only. And it may be asked is the question to be raised in each of these cases, did the defendant see the traveller write out the order? did he approve of it? and are these questions to be left to the jury—we well know with what result. I think that these questions ought to be answered in the negative, and that this rule should be discharged.

POLLOCK, B. I also agree that this rule should be discharged. I think that it is extremely important in all those cases in which it is attempted to prove an implied agency, or that there is evidence from which an agency may be inferred, to take into account the character of the parties and their usual course of dealing. The Act requires that the note of the bargain should be signed by an agent of the party to be charged. At first sight it would seem odd that where two contracting parties meet together, that one who is in a position somewhat adverse to the other should be his representative and agent. But no doubt such a thing may happen, as in the instance which has very properly been cited of the auctioneer's clerk signing as agent of both parties. In Lord St. Leonards' work on Vendors and Purchasers, 14th ed. p. 147, he explains the principle upon which the auctioneer can bind both vendor and purchaser by his signature, citing *Earl*

of Glengal v. *Barnard* (1), and *Emmerson* v. *Heelis* (2), and stating that the implied agency of an auctioneer is not extended to other cases. Therefore the present case is not within this exceptional rule. The case to which it has the nearest analogy is that of *Durrell* v. *Evans* (3), and it is remarkable that when that case came before the Court of Exchequer, Lord Penzance seems to have drawn the conclusion that what was done was nothing more than what occurs in making out and giving an invoice. I am bound to say that I agree with his reasoning, and I will apply it to the present case. I think *Durrell* v. *Evans* (3) can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes the factor to alter the instrument, was an adoption of his act in preparing it, or a recognition ab initio of the whole document as containing the contract. Or one might go further and say that, from the nature of the transaction, and the meeting of the parties at the office, it might be thought that there was evidence that it was meant that Noakes should act as the scribe of both parties in drawing up a note of the contract. But here there is an entire absence of any act of recognition by the defendant of the traveller as his agent. The rule must be discharged.

Rule discharged.

Attorney for plaintiff: *W. R. Buchanan.*
Attorney for defendant: *F. Berkeley Calcott.*

(1) 1 Keen, 769. (2) 2 Taunt. 38.
(3) 1 H. & C. 174; 31 L. J. (Ex.) 337.

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LOCKHART *v.* FALK.

Ship—Shipping—Charterparty— Demurrage—Clause exempting from Liability.

10 Q B 556

By a charterparty made with the defendant, plaintiff's ship was to proceed to W., and there load a cargo "in the customary manner," and proceed to R. and deliver, "the cargo to be discharged in ten working days (weather permitting), commencing, &c. Demurrage at 2*l.* per 100 tons reg. per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The customary rate of loading at W. was proved to be twenty tons a day:—

Held, that the clause for lien and for exemption of the charterer applied only to demurrage at the port of discharge, not to damages for delay at the port of loading.

Appeal from the Liverpool County Court.

The action was brought to recover damages for detention under a charterparty made on the 16th of March, 1874, between the master of the plaintiff's ship *Zoe*, of 138 tons measurement, and the defendant, by which the ship was to proceed to Weston Point, and there load a cargo of salt of 250 tons, "in the customary manner," and proceed with the same to Riga Bridge, and there deliver, "the cargo to be discharged in ten working days (weather permitting), commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2*l.* per 100 tons reg. per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship."

The vessel proceeded to Weston Point on the 20th of March, and notice was given on the 21st that she was ready to load. No cargo was loaded till the 11th of April, and the loading was not completed till the 20th, when bills of lading were signed (dated the 18th) to the order of defendant or his assigns, "he or they paying freight for the said goods and all other conditions, as per charterparty."

It was proved that the usual dispatch of the port was at least twenty tons per working day for loading; the plaintiff therefore contended that the loading should have been completed on the

4th of April, and claimed damages for detention. The defendant, on the other hand, contended that the claim was one for demurrage, and that his liability had therefore ceased under the charterparty.

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The learned judge held that the claim was not for demurrage, and gave judgment for the plaintiff for 44*l.* 2*s.* 8*d.*, being damages for detention at the rate of 2*l.* 15*s.* 2*d.* per day.

Jan. 20. *Gully*, for the defendant. The result of the cases is that, whenever a lien is given for demurrage, the clause absolving the charterer from liability applies: *Gray* v. *Carr* (1), *Christoffersen* v. *Hansen* (2), *Francesco* v. *Massey* (3); and *Bannister* v. *Breslauer* (4), shews that effect will be given to such a stipulation by applying it wherever it appears to be the intention of the parties that the lien should exist, and although the charge may not be strictly demurrage. The lien here covers the delay in loading; the vessel was to load in the customary manner, and it was proved that by the custom of the port a definite time is given for loading. It can make no matter whether a fixed time is specified in the charterparty, or whether terms are used which, when construed by the facts, make the time certain; the result is that a time is fixed by the charterparty. The claim is, therefore, one for demurrage, at the stipulated rate of 2*l.* per 100 tons, which is covered by the lien, and the charterer is released by the delivery on board of the cargo. [He also contended that the plaintiff was estopped by the date of the bill of lading from claiming damages for delay beyond the 18th of April.]

R. G. Williams, Q.C., for the plaintiff. No time is fixed by the charterparty for loading. The words "in the customary manner," do not refer to the time, but to the manner in which the loading is to take place: *Lawson* v. *Burness* (5), *Tapscott* v. *Balfour.* (6) No time being fixed, the claim is not for demurrage, to which the stipulated rate of 2*l.* per 100 tons and the stipulated time of ten days refers, but it is a claim for not loading in a reasonable time, in respect of which no rate and no period is named. The

(1) Law Rep. 6 Q. B. 522.
(2) Law Rep. 7 Q. B. 509.
(3) Law Rep. 8 Ex. 101.
(4) Law Rep. 2 C. P. 497.
(5) 1 H. & C. 396.
(6) Law Rep. 8 C. P. 46.

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clause, therefore, absolving the charterer from liability does not apply. Primâ facie, such a clause relates only to future liabilities: *Pedersen* v. *Lotinga* (1), *Christoffersen* v. *Hansen* (2); not to such as have already accrued when the event releasing the charterer takes place. In *Oglesby* v. *Yglesias* (3), and *Milvain* v. *Perez* (4), the clause was extended to liabilities already accrued, because the express words of the provision required it; but this will not be done unless there are express words or a plain inference. In *Francesco* v. *Massey* (5), it was held that the words used had that effect, but there a time was fixed both for loading and discharge, so that there was with respect to both a fixed time from which the ten days' demurrage could be reckoned; and, on the other hand, in *Bannister* v. *Breslauer* (6), where the same was held, no time was fixed either for loading or discharge, nor was there any demurrage clause, so that if the clause had not been applied to damage for detention, there was nothing to which the word "demurrage" would have been applicable. *Bannister* v. *Breslauer* (6) has, however, been doubted: see *Gray* v. *Carr*. (7) In the present case there is a time fixed for discharge, but none for loading; the clause giving a lien and releasing the charterers from liability, is therefore to be limited to the liquidated claim, which might afterwards become due at the port of discharge, and ought not to be extended to the claim for unliquidated damages already accrued.

Gully, in reply.

Cur. adv. vult.

Feb. 12. The judgment of the Court (Cleasby, Pollock, and Amphlett, BB.) was delivered by

CLEASBY, B. The question in this case is whether the charterer is liable for detention at the port of loading by not loading in the customary manner. There is also a question of amount depending upon the number of days during which the vessel was detained. We think the detention must be taken up to the time when the

(1) 28 L. T. 267; 5 W. R. 290.
(2) Law Rep. 7 Q. B. 509.
(3) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(4) 3 E. & E. 495; 30 L. J. (Q.B.) 90.
(5) Law Rep. 8 Ex. 101.
(6) Law Rep. 2 C. P. 497.
(7) Law Rep. 6 Q. B. 522, at pp. 536, 546, 549.

cargo was loaded, and that the date of the bill of lading is not conclusive.

There is a clause in the charterparty giving the shipowner a lien for freight and demurrage, and providing that the charterer's liability shall cease upon a cargo being put on board. The question really becomes, whether what may be called the "lien and exemption clause," which no doubt applies to demurrage properly so called, also applies, upon the language of this charter, to a claim for undue detention at the port of loading. A similar question has frequently arisen before, and we should not think of departing from what has been already decided; but it must always be borne in mind that if the language is not the same the decision may not be applicable. There is no case exactly the same as the present one.

The word "demurrage" no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charterparty containing the clause in question we must collect what is the proper meaning to be assigned to it. When the charterparty contains no clause allowing demurrage at a specified rate at all, it has been held that the word "demurrage" in the exemption clause applies to detention, and that the charterer is discharged as soon as a cargo is on board. This was the case of *Bannister* v. *Breslauer*. (1) That decision is certainly not applicable to the present case, because we have in this charterparty a demurrage clause, though not a precise one. In the present case the charter provides that the ship shall be discharged in ten working days, and afterwards has these words, "Demurrage at 2*l.* per 100 tons register per day."

It has also been decided that when there is a time specified for loading, and also a time for unloading fixed by its being at the rate of so many tons a day, and afterwards a demurrage clause for a fixed number of days at an agreed price per day, that in that case the exemption clause applies to demurrage, whether at the

(1) Law Rep. 2 C. P. 497.

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port of loading or discharge; but it was thought clear it did not apply to detention beyond the lay days and demurrage days at the port of loading. This was the case of *Francesco* v. *Massey*. (1) The effect of this decision is, that where there is a clause for demurrage at a specified rate for a certain number of days, and, a number of days being allowed for loading, there can be demurrage in the proper sense at the port of loading, the exemption clause applies to demurrage there.

And if we could read the provision for loading in the present case as fixing a particular time for doing so, the decision would apply at all events to the period, though not specified, to which the demurrage clause might be considered to apply. But we do not think we can read the words that the vessel shall load in the customary manner as equivalent to a provision that she shall load in a certain number of days, or at a certain rate per day, for the purpose of applying the word "demurrage" to a detention beyond that period. Those words do not admit, in our opinion, of an addition that she may remain, if she does not load in the customary manner, for a number of days on demurrage.

The conclusion at which we arrive is, that in the present case the word "demurrage" in the lien and exemption clause must be confined to demurrage days after the ten working days allowed for discharge, and not extended to improper detention at the port of loading.

The decision in the Court below was therefore right, and the appeal must be dismissed.

Appeal dismissed.

Attorneys for plaintiff: *Prior, Bigg, & Co., for J. B. Wilson, Liverpool.*

Attorney for defendant: *G. H. Field, for Thomas Etty, Liverpool.*

(1) Law Rep. 8 Ex. 101.

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1875
Jan. 23.

Landlord and Tenant—Fixtures—Trustee in Liquidation.

A lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be "cleared" by the purchaser in two days from the sale. The plaintiff bought the fixtures; but, with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, and the trustee surrendered the premises to the landlord, who re-let them, the fixtures still remaining affixed. About a fortnight afterwards the plaintiff, learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between the plaintiff and a person claiming title through the new tenant:—

Held, that the plaintiff had not lost his right by delay or laches, and that he was entitled to the fixtures.

INTERPLEADER. Issue tried before Mr. Watkin Williams, Q.C., sitting as commissioner at the Surrey summer assizes, 1874.

The facts were as follows:—The property in question consisted of fixtures in a house in Fore Street, in the city of London, which had been held on lease by a firm of Huntley & Saint. The firm went into liquidation, and the trustee put up the whole effects of the firm for sale by auction.

On the 25th of July, 1873, under conditions of sale, one of which was, "All the lots to be taken and cleared with all faults, at the purchaser's expense, within two days after the sale," the plaintiff, who was brother to one of the members of the firm, bought, amongst other things, the greater part of the fixtures: he paid for them on the 15th of August, but by arrangement with the trustee, he did not remove the fixtures, intending to take the premises and set up his brother in business there again. He negotiated with the landlord for this purpose, but failed to come to terms with him, and in October the trustee sent the keys to the landlord, with a note giving up possession of the premises to him. About a fortnight afterwards the plaintiff, hearing what had been done, applied to the landlord for the fixtures which he had bought, and found that the premises had been let to a person, who afterwards let them to the defendant, the fixtures being still

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on the premises, which had till then remained closed. Ultimately an action was commenced by the plaintiff against one Lockyer, who had then come into possession of the premises and the fixtures under the defendant; and Lockyer having taken out an interpleader summons, the present issue was directed.

On these facts a verdict was entered for the plaintiff for the value of the fixtures, with leave to the defendant to move to enter the verdict for him, the Court to have power to draw inferences. A rule having been obtained accordingly,

Gore and *Plumptre* shewed cause, and contended that by the sale to the plaintiff the property in the fixtures had vested in him: *Hallen* v. *Runder* (1); that the act of the trustee was not a disclaimer under the Bankruptcy Act, 1861, s. 23, and that if it had been intended as such it could not have divested the right of the plaintiff; that it amounted, at the utmost, only to a surrender, which was completed by the acceptance of the landlord, and the new tenancy; that such a surrender could have no effect on rights already acquired for good consideration from the tenant; and that the right to remove as against the landlord was not lost, a reasonable time for removal not having, under the circumstances, elapsed since the termination of the tenancy and its communication to the plaintiff: *London and Westminster Loan and Discount Co.* v. *Drake*. (2)

Philbrick, Q.C., and *W. A. Lewis*, in support of the rule, admitted that there was no disclaimer under the Bankruptcy Act, 1861, s. 23, and that what was done by the trustee could not therefore have the retrospective effect given to a disclaimer by that section: but contended that all that the plaintiff bought was the right to enter and remove the fixtures, which right ought, under the conditions of sale, to have been exercised within two days, but ought, at any rate, to have been exercised during the continuance of the term, or at least of the possession: *Leader* v. *Homewood* (3); and that *London and Westminster Loan and Discount Co.* v. *Drake* (2) did not apply, because in that case there

(1) 1 C. M. & R. 266.
(2) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.
(3) 5 C. B. (N.S.) 546; 27 L. J. (C.P.) 316.

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was no such stipulation for the removal of the fixtures as in the present case.

They also contended that certain of the fixtures were not trade fixtures. [They also cited Amos on Fixtures, 2nd ed. p. 239.]

CLEASBY, B. On the evidence we must take it that all the articles were of such a nature as the tenant had a right to remove. The question is, how far that right has been lost by reason of the neglect of the plaintiff as against the landlord to remove them within a reasonable time. Now what took place was this: it was not intended to remove them at all; they were bought by the plaintiff in the hope that, as there was a bankruptcy, and as the trustee would not be likely to continue the business, there would be an opportunity of taking the premises and setting up the bankrupt in business there again. Negotiations for this purpose were carried on with the landlord for about two months; then, fourteen days after the surrender by the trustee, the goods were applied for and possession of them was refused, and subsequently a formal demand was made. It is sufficient to say that at the earlier period the plaintiff was in time, and that is enough to prevent the plaintiff from losing his right of removal.

The real question between the parties is the title to these articles; and it is quite plain that the surrender did not forfeit the right which the vendee of the property had acquired. The general maxim is laid down in Co. Litt. 338 b: "Having regard to the parties to the surrender, the estate is absolutely drowned . . . But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance." Therefore, though the term was surrendered, yet the plaintiff's right was not affected; the defendant came into possession of the premises with chattels upon them, which were subject to the rights of a third person. The case of *London and Westminster Loan and Discount Co.* v. *Drake* (1) is an authority which applies to the present case, and we could not decide on the

(1) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.

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ground taken by Mr. Philbrick without, in effect, overruling that decision. The rule must, therefore, be discharged.

POLLOCK, B. I am of the same opinion. The first question is whether the goods were fixtures which the tenant was entitled to remove, which is a question partly of fact and partly of law; we have power to draw inferences, and, looking at the character of these articles, I am of opinion that they were such. The second question is as to the effect of the note sent to the landlord by the trustee; and I have come to the conclusion that, though it was not a disclaimer, yet being consented to and acted upon, it was valid as evidence of a surrender by operation of law. Thirdly, assuming there was a surrender by operation of law, what were the rights of the plaintiff? Now the right of a tenant has long been considered as more than a bare right to remove. In *Poole's Case* (1), Lord Holt lays down that "this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might; and the reason is because in that case the tenant hath only a bare power without an interest; but here the underlessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and sell." The tenant has, therefore, an interest in the fixtures which may well be the subject of an assignment. If so, then the passage from Co. Litt. 338 b., cited by Willes, J., in *London and Westminster Loan and Discount Company* v. *Drake* (2), applies, and is not only binding upon us, but is agreeable to the true notions of what is right and equitable. But Mr. Philbrick argued that the plaintiff had either abandoned this right or been deprived of it by laches. To determine this, we must look at the whole circumstances of the case; and I am of opinion that the plaintiff did all that a reasonable man could be expected to do.

AMPHLETT, B. I am of the same opinion. The tenant was entitled during his tenancy to remove the fixtures. On his becoming bankrupt, the trustee might have disclaimed; he would then have had no further interest in the fixtures, and by s. 23

(1) 1 Salk. 368. (2) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.

of the Bankruptcy Act, 1869, the disclaimer would have taken effect from the date of the order. But before anything like a disclaimer, he sold the fixtures; and if it were necessary to decide the point, I should be disposed to agree with the view taken in Amos on Fixtures (2nd ed. p. 239), that after the sale of the fixtures he could not have disclaimed, because he would have dismantled the house. That question, however, does not arise, because it is admitted there was no disclaimer. But as to the fixtures, the plaintiff having bought and paid for them, the property in them vested in him, and he had the same right of removal which the tenant had had. Subsequently the trustee took on himself to surrender the term to the landlord, and the question is whether this surrender, though good as regards the tenant, could prejudice a third person who had derived an interest for value from the tenant through the trustee. It is a well-known rule that a man cannot derogate from his own grant, and the surrender to the landlord must therefore be subject to the sale previously made to the plaintiff. I should without hesitation apply that rule if there were no decision to that effect; but we have an express authority in *London and Westminster Loan and Discount Co.* v. *Drake.* (1)

But, again, it is said that the right of removal must be exercised within a reasonable time after the surrender, or rather, for this is the proper period to look to in this case, after notice of the surrender, and that this was not done. I think, however, that the plaintiff did apply within a reasonable time, and that he is not therefore debarred from asserting his right to the fixtures.

Rule discharged.

Attorney for plaintiff: *J. M. Green.*
Attorneys for defendant: *A. J. Baylis & Son.*

(1) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.

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Feb. 10.

MACKENZIE *v.* WHITWORTH.

Marine Insurance—Re-insurance—Policy—Interest.

An underwriter "on goods" may re-insure by the same description; and the policy need not be expressed to be a re-insurance.

THIS was an action on a policy, dated the 24th of April, 1873, and effected with the defendant by the plaintiff through his agents, as well in their own names as for and in the name and names of all and every other person to whom the same did appertain, "at and from New Orleans to Revel *upon goods*, beginning the adventure upon the said goods from the loading thereof on board the ship *Southampton* at as above," the policy being a valued one for 5000*l.*

The declaration, after stating the policy, averred that The United States Lloyd's and Individual Underwriters of New York were interested in the said goods, and that the policy sued upon was made for the use and benefit and on account of the persons so interested.

The defendant pleaded, amongst other pleas, 4, denial of the interest alleged; 8, concealment that the interest was that of insurers.

At the trial of the cause before Pollock, B., at the Liverpool summer assizes, 1874, it appeared that The United States Lloyd's and Individual Underwriters of New York had underwritten a policy on the goods mentioned, being cotton to be shipped by Messrs. Putnam & Co., of New Orleans, to the amount of 80,000*l.*, and that the policy in question was effected for them to cover a portion of their risk, of which they still held 20,000*l.*

Evidence was given on the part of the defendant, which was not contradicted, and it was in fact admitted on the part of the plaintiff that in all cases of re-insurance policies the invariable practice had been to disclose the fact that the policy was for re-insurance; and it was proved that the plaintiff, at the time of the insurance, knew that such was the nature of the policy in question, but that this fact was not communicated to the defendant.

Evidence was also given, both on the part of the plaintiff and

the defendant, as to whether this was a fact material to the risk or material to be communicated to the defendant; and in particular the defendant gave evidence that he would not have underwritten the policy if he had known that it was a re-insurance, and that it was the practice of many underwriters to refuse re-insurances.

Cotton to the value insured by The United States Lloyd's and Individual Underwriters of New York was shipped at New Orleans; the ship sailed on the 28th of February, 1873, and was, with the cargo, destroyed by fire on the 19th of March.

The learned judge ruled that the interest of The United States Lloyd's and Individual Underwriters of New York was sufficiently described in the policy, and left to the jury the question of concealment. The jury found for the plaintiff on all the issues of fact, and a verdict was thereupon entered for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him.

A rule having been obtained accordingly, on the ground that the plaintiff, being only interested as an insurer, was not entitled to recover on the policy sued on,

Benjamin, Q.C., and *Myburgh*, shewed cause. The objection that the policy was not stated to be a re-insurance cannot be rested on the ground that a material circumstance was not disclosed, because the jury have found for the plaintiff upon the plea of concealment. The objection, therefore, must be that as a matter of law a policy of re-insurance must be so described, or that the interest of the assured must be described as an interest in re-insurance. But the true rule of insurance law is that the subject-matter of insurance only need be described; in general, the interest of the assured in that subject-matter need not: Arnould on Mar. Ins. 4th ed. vol. i. p. 21; Phillips on Ins. art. 415. Thus it is the constant practice for carriers, bailees, and mortgagees to insure without describing their interest, and to recover according to the extent of their interest. The general rule is so laid down expressly in *Crowley* v. *Cohen* (1) in the case of carriers, and in substance

(1) 3 B. & Ad. 478, at p. 485, per Lord Tenterden, C.J.

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that case is identical with the present, because the interest of carriers is only their liability over as insurers of the goods they carry. The case of warehousemen is similar; their interest is their liability to those who have entrusted goods to them. If, therefore, an insurer effecting a re-insurance is bound to describe the nature of his interest, it is, with one exception, the only case in which a statement of the nature of the interest is required. That exception is in the case of bottomry and respondentia, which is always treated as an exceptional instance, and is expressly stated to be such by Lord Mansfield, C.J., in the case in which the point was established: *Glover* v. *Black.* (1) That case was decided entirely on a usage and practice said to prevail among merchants that bottomry and respondentia must be insured eo nomine; and that the decision was founded on this, and not on general principles, is shewn by the subsequent case of *Reed* v. *Cole* (2), where the policy was in substance nothing else but a re-insurance. Further, the custom proved or admitted in the present case is entirely accounted for by the statutory rule which prevailed till very recently. By 19 Geo. 2, c. 37, s. 4, all re-insurance was prohibited, except in certain cases, and in those cases it was allowed only "provided it be expressed in the policy to be a re-insurance." The prohibition was removed by 27 & 28 Vict. c. 56, s. 1; but the proviso remained in force until 30 & 31 Vict. c. 23, sched. D, repealed the whole section, which was also included in the schedule to 30 & 31 Vict. c. 59 (the Statute Law Revision Act, 1867). Therefore, until 1867, the statement in the policy that it was a re-insurance was required by statute (which of itself tends to shew that it was otherwise unnecessary), and no inference can be drawn from the usage of mentioning it during that time, or from the survival of that usage since. This case, therefore, falls within the general rule, and not within any exception to it; and this is the opinion of Phillips on Ins. art. 498, referring to *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance Co.* (3) [He also referred to *Anderson* v. *Morice.* (4)]

(1) 3 Burr. 1394.
(2) 3 Burr. 1512.
(3) 17 Wend. 359.
(4) Law Rep. 10 C. P. 58.

Herschell, Q.C., and *Baylis*, in support of the rule. The subject-matter of the policy is not properly described. The case of bailees, carriers, and others having a possessory interest in the goods is not in point. Having a real interest in the goods themselves, an insurance effected by them may be properly described as an insurance on goods, and the additional interest which they have in respect of their liability over does not make that description incorrect: *London and North-Western Ry. Co.* v. *Glyn.* (1) The same is true with respect to mortgagor and mortgagee; the one is the owner of the ship, the other is an incumbrancer upon it with a power of sale, and clearly has an interest in it. But an insurer has no interest in the goods themselves; his interest is only in a contract by which, in consideration of premiums, he undertakes to indemnify against their loss or damage. He may be said to have an interest in the event of the safe arrival of the goods, but not in the goods themselves. In countries where re-insurance has been constantly allowed, it is in general not only customary, but necessary by law to describe the policy as one of re-insurance: see Arnould, Mar. Ins. 2nd ed. vol. i. p. 340, n. (*z*). The case cited by Phillips of *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance Co.* (2) does not bear out the proposition for which he quotes it; it is true that the policy was on goods, but it was stated on the face of it to be a re-insurance. Moreover, in that case the policy was successfully attacked on the ground of the noncommunication of facts relating to the original assured; the chief importance therefore of the case is that it shews the propriety of informing the underwriter that it is a re-insurance. And, though Phillips inclines to the opposite view, he cites Christian as an authority that "a re-assurance must be expressly mentioned to be a re-assurance in the policy." But even assuming that the interest of an insurer could independently of custom be properly described as an interest in goods, the general usage and custom among underwriters would make the description improper. The reason of the decision in *Glover* v. *Black* (3) applies to the present case. If, on the ground that it was the usage to insure

(1) 1 E. & E. 652; 28 L. J. (Q.B.) 188.

(2) 17 Wend. 359.

(3) 3 Burr. 1394.

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bottomry and respondentia eo nomine, it was held that a policy on respondentia describing it merely as "goods" was bad, the same result will follow with respect to re-insurance. A contract is to be interpreted according to the intention of the parties as expressed in the ordinary terms of mercantile dealing; and if by mercantile custom and usage a contract of re-insurance is not described merely as an insurance on goods, the underwriter cannot be bound by a contract of re-insurance so expressed; he never intended to be so bound, and the contract is not one which, interpreted according to usage, so binds him. It can make no matter how the custom originated, if it exists, and the fact that till lately it was necessary by statute to state the policy to be a re-insurance only shews the universality of the custom, and makes it the more certain that the mercantile interpretation of an ordinary insurance on goods excludes re-insurances. The express mention of re-insurance in 30 Vict. c. 23, s. 4, also shews the common understanding. The description in this policy is therefore neither in itself a proper one, nor, if otherwise proper, is it one which, as interpreted by the custom prevailing among underwriters, properly expresses the intention of the defendant to become a party to a policy of re-insurance.

BRAMWELL, B. I am of opinion that this rule must be discharged. It is admitted that, as a general rule, a policy of marine insurance must contain a description of the ship, the subject-matter of the insurance, the voyage, and the perils insured against, and the assured, if challenged, must shew the extent of his interest. A policy of marine insurance is said to be an instrument which has a meaning by custom, and if you were to prepare a new form you would say that, in consideration of such and such a premium, the underwriter undertakes to indemnify the assured against the risk of a certain loss occasioning damage to him. That means that you must state the ship, the subject-matter of inance, the risk or voyage, and the perils insured against. Now here that has been done, because the plaintiff says, "What I want to be insured against, is the non-arrival of the goods described." Therefore, it is rather for the defendant to make out that there is

some cause why an exception to the general rule should be introduced in his favour, than for the plaintiff to make out that he has done all that can be required of him. The defendant seeks to make this out on a ground which, if good at all, goes rather to the question of concealment than to anything else. He says, "It is true you are interested in the arrival of the goods, and will be damaged by their non-arrival, or arrival in a damaged condition; but you have concealed from me that you were not what those who insure generally are, that is, an owner, but were only an insurer." Now, if that is a good reason for the underwriter to advance, then the jury should have found for the defendant, on the ground of concealment; and it may be that there is good reason why they should find that it is material to the underwriter that he should know that the policy is a re-insurance. But there is no rule on the ground that the verdict is against the weight of evidence. If, however, it is immaterial, then I cannot very well see why it should be stated in any shape, and I should not be very ready to introduce another anomaly into the law relating to the preparation of policies of insurance in favour of something that is immaterial, especially since the underwriter may put in any clause that he thinks necessary for his protection, and might, if he thought fit, have inserted the words "warranted not a re-insurance." The case therefore stands thus: if it is material, the jury should have found against the plaintiff on the issue of concealment; if it is immaterial, it is not for us to introduce an anomaly into the general law when the underwriter may guard himself by express words.

The authorities, it seems to me, are strong in the plaintiff's favour. There is the case of the carrier who is at liberty to insure goods in the same way that an owner would, without stating that his interest is his liability over to the owner. I have not forgotten the ingenious argument of Mr. Herschell with respect to the possessory interest of a bailee of goods; but the answer is, that if he insured nothing but his possessory interest he could only recover a nominal amount; that he may and does recover substantial damages shews that he is insuring in respect of his liability to the owner. So, in the case of the mortgagor

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and mortgagee of a ship; they can both insure, and can recover in respect of their respective general interests in the ship. The rule, indeed, is that you must specify the subject-matter of insurance, not your interest in it, and this is so laid down in the passages in Arnould and Phillips cited by Mr. Benjamin.

The only case relied on for the contrary proposition is one which we must treat with great respect, but I must confess I do not understand the principle of the decision. It is the case of *Glover* v. *Black* (1), where it was held that in an insurance of respondentia it must be so described. It was so held under peculiar circumstances, and apparently in consequence of an understanding said to prevail among merchants, that where respondentia was insured, it was insured eo nomine, and was not described as an insurance on goods. If so, I should have thought it was a matter that went to concealment, for I do not see how the practice of merchants could make the statement in the policy erroneous. However, if the question here arose on an insurance of respondentia, we would follow that case, and leave the plaintiff to error. But it is not such; and Lord Mansfield expressly says, in *Glover* v. *Black* (1), that the decision is not to be taken as laying down a general rule. If so, the case is one decided on the ground of convenience and with reference to the particular mercantile understanding referred to, and does not govern that now before us; and it is no authority in favour of introducing a second anomaly into the law of insurance. Therefore the rule must be discharged.

POLLOCK, B. I am of the same opinion. The finding of the jury was that there was no concealment in not stating that the policy was a re-insurance. This observation is of considerable weight, because it excludes any argument tending to shew that there was any substantial increase over the contemplated risk, or any difference in the premium, in consequence of the fact being withheld.

The question of law, therefore, which we have to decide is, whether by any known practice, or by any rule of law, the person effecting a policy of re-insurance, is bound to state that it is a re-

(1) 3 Burr. 1394.

insurance. It is not contended, nor could it be, that he is bound to state the risk to be on re-insurance, but it is said that he ought to state the policy to be a second insurance, and that otherwise he cannot recover upon it. Is there, then, any authority for this proposition? I can find none. Re-insurance has been known almost as long as insurance, and (except during a certain period in our own country) it has been practised all over the world. The general rule is that it is the duty of the assured to state the subject-matter of insurance, and then, before he can avail himself of the fruits of his policy, he must go further, and shew the extent of his interest. Emerigon, ch. 8, s. 14, cites the Ordonnance in these terms: "It shall be allowable to insurers to re-insure with others the *effects* they have insured" (1); and Pothier, Traité d'Ass. art. 35, says: "C'est par le même principe qu'on ne peut faire assurer que ce qu'on risque de perdre, qu'un assureur peut bien faire réassurer les *effets* qu'il a assurés, parce que la perte qui en peut arriver, est pour lui une perte qu'il court risque de faire." This takes for granted that the re-insurance is an insurance on the "effects," although the interest of the assured is different. In English law there are abundant illustrations of this rule. The carrier who has only a partial interest in the goods, the vendor who may have parted with his property in the goods, the bailee who never had any property in them, the mortgagor and mortgagee of the ship, may insure and may recover according to their respective interests. In *Reed* v. *Cole* (2), where a member of a mutual assurance society had parted with his vessel before the loss, he was held entitled

(1) In chap. 10, s. 11, Emerigon says: "The Ordonnance requires a special stipulation on the subject of the tenth whenever this is intended to be insured (Ord. 18, 19). It is the same with freight earned, which the Declaration of 1779 allows to be insured. So also with the sum which one causes to be re-insured." The text of the Ordonnance is as follows:—Liv. 2. tit. 6, art. 18: "Les assurés courront toujours risque du dixième des effets qu'ils auront chargés, *s'il n'y a déclaration expresse dans la police* qu'ils entendent faire assurer le total. 19. Et si les assurés sont dans le vaisseau, ou qu'ils en soient les propriétaires, ils ne laisseront pas de courir risque du dixième, encore qu'ils aient *déclaré* faire assurer le total. 20. Il sera loisible aux assureurs de faire réassurer par d'autres *les effets* qu'ils auront assurés, de faire assurer le coût de l'assurance et la solvabilité des assureurs;" nothing being said in the Ordonnance as to a *declaration* in the case of re-insurance.

(2) 3 Burr. 1512.

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to recover on the articles of agreement, because he was still a member, and "continued contributory to the losses of the others," and "still had an interest in the safety of the ship," because he had agreed with the purchaser to pay 500*l.* if a loss happened within three months. "He had not parted with all his interest in it, but continued interested quoad this loss." In that case he was no more an owner of the vessel than any other person in the world; but he had undertaken a liability contingent on the safety of the ship, and was therefore held entitled to recover. This was decided shortly after *Glover* v. *Black* (1), and is an authority to shew that that decision was not intended to impair the general rule that it is sufficient to set forth the subject-matter of insurance.

In *Glover* v. *Black* (1) it was no doubt held that one who had advanced money on respondentia could not insure it without stating the insurance to be on respondentia. We must pay all respect to that decision, but it is to be observed that for some time previously there had been a great jealousy as to money borrowed on ships and cargoes, both with respect to those who borrowed and those who lent. Merchants were often mere adventurers who, having paid nothing for the goods shipped, immediately insured them, and those who had advanced the money insured their advance at maritime interest. Wager policies and gambling insurances were of frequent occurrence. This is a practice which all writers on insurance law have set themselves against, as may be seen in Emerigon (2) and Pothier (3), and art. 347 of the Code de Commerce. (4)

It was in that state of circumstances that the case came before the Court, and it was no doubt treated by the Court as a fact that there was a general usage and understanding of merchants that an insurance of respondentia or bottomry should be so described. Lord Mansfield was at first very much inclined to support the policy; and in deciding against it he said, "It is established now,

(1) 3 Burr. 1394.
(2) Emerigon, ch. 8, s. 11.
(3) Poth. Tr. de l'Ass. art. 31.
(4) Code de Com. art. 347: "Le contrat d'assurance est nul s'il a pour objet . . . les profits maritimes des sommes prêtées a la grosse."

on the law and practice of merchants, that respondentia and bottomry must be mentioned and specified in the policy of insurance," but he added, "they did not mean to determine that no special interest in goods may be given in evidence in other cases than those of respondentia and bottomry, if the circumstances of the case shall admit of it." It is remarkable that in the same court, about twenty years afterwards, in the case of *Gregory* v. *Christie* (1), cited in Park on Ins. 8th ed. pp. 11, 104, it was held that where a policy contained the words "goods, specie, and effects," the assured was entitled, on the ground of "express usage," to recover a sum of money advanced by the master for the benefit of the ship, and for which he charged a respondentia interest; and Buller, J., cites *Glover* v. *Black* (2) as an authority for the decision. The meaning, therefore, of *Glover* v. *Black* (2) is, that it was the practical interpretation of policies of insurance in trade that in a policy the words "goods and merchandises" did not describe respondentia. Therefore respondentia and bottomry rested on some peculiar grounds. The case of re-insurance rests on none, unless we remove away from merely legal grounds to grounds of fact, and consider whether it is material to the underwriter that he should know it to be a re-insurance, and then, cadit quæstio, because the jury have found it to be immaterial.

AMPHLETT, B. I was for some time doubtful, but I am now satisfied that my doubts were not well grounded. My doubt was whether the subject-matter of insurance was sufficiently described in the policy; for no doubt to common apprehension there is a great difference between an insurance on goods and an insurance on the risk which the assured is to incur as insurer of these goods, and cases might be put where a very different defence might arise on the two policies. But I have come to the conclusion that the fact of the policy being a re-insurance is only a limitation on the liability of the second insurer, and does not make his risk cease to be a risk on goods.

Then the question arises, whether the existence of a custom that it should be mentioned would affect the policy? And I agree

(1) 3 Doug. 419. (2) 3 Burr. 1394.

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there is a very great deal in favour of the view that this may affect the question, not whether as a matter of law the policy is void, but whether the policy is void by reason of concealment of a material fact. It is impossible not to see that, even though the risk were the same, it would be convenient for the underwriter to know that the risk he was insuring was only the risk of the first insurer; and there is no doubt a notion prevailing that it is right and proper that the fact of the first insurance should be mentioned. And that it is right and proper derives support from the proviso in 19 Geo. 2, c. 37, s. 4. There appears also to be reason to say that this practice prevails very generally throughout the world. But although no doubt there is a notion widely prevailing that it is right and proper the fact should be mentioned, and we have what is equivalent to a finding, namely, an admission by Mr. Benjamin at the trial, that it is a very general usage and practice to mention it; yet, as the jury have found that there was no undue concealment, and as there is no rule questioning the verdict on that point, we must assume that the finding is right. The rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Norris, Allen, & Co., for Simpson & North, Liverpool.*

Attorneys for defendant: *Gregory & Co., for Hull, Stone, and Fletcher, Liverpool.*

Discussed. OLIVER v. DAVIS. [1949] 2 K. B. 727

[IN THE EXCHEQUER CHAMBER.]

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Feb. 11.

CURRIE AND OTHERS *v.* MISA.

Pre-existing Debt—Cheque given on Account of—Negotiable Security payable on Demand.

The title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him bonâ fide and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand.

Judgment of the Court below affirmed (Lord Coleridge, C.J., dissenting).

Affirmed by H. of L. 1 App. Cas. 554.

APPEAL by the defendant against the decision of the Court of Exchequer, refusing to grant a rule nisi to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, or a nonsuit.

The action was brought to recover 1999*l.* 3*s.* upon a cheque of the defendant and interest thereon.

The declaration stated that the defendant, on the 14th of February, 1873, by his cheque or order for the payment of money directed to Messrs. Barnetts, Hoares, Hanburys, & Lloyd, bankers, required them to pay to F. de Lizardi & Co., or bearer, 1999*l.* 3*s.*, and that the plaintiffs became the bearers of the said cheque, and the same was duly presented for payment and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Pleas: 1. Denial that the plaintiffs became the bearers of the said cheque as alleged.

3. That there never was any consideration for the making or payment of the cheque by the defendant, and that F. de Lizardi & Co. delivered the cheque to the plaintiffs to hold the same as the agents of and on account of F. de Lizardi & Co., and not as bearers or transferees thereof. And that the plaintiffs presented the cheque for payment to the defendant as such agents for and on account of F. de Lizardi & Co., and not as the bearers or transferees thereof. And that when the cheque was presented for payment to the defendant, and dishonoured by him, the plaintiffs had notice that there never was any consideration for the making or payment of the cheque by the defendant.

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4. That the defendant was induced to draw the cheque and to deliver the same to F. de Lizardi & Co. by the fraud of F. de Lizardi & Co., and that the plaintiffs were and are the bearers of the cheque, and have always held the same without giving any consideration for the same.

5. That there never was any consideration for the defendant's making or paying the cheque, and that the plaintiffs became and are the bearers of the cheque, and have always held the same without having given any consideration for the same.

Issue: and demurrer to third plea and joinder.

The cause was tried at the London sittings at Guildhall, after Michaelmas Term, 1873, before Kelly, C.B., when the following facts were proved:—

The plaintiffs are bankers, carrying on business in Lombard Street, London, under the firm of "Glyn, Mills, Currie, & Co." The defendant is a wholesale wine merchant, carrying on business in London and at Xerez, near Cadiz, in Spain. Joseph Javier de Lizardi was a general merchant, who was a partner of or traded under the firm of "F. de Lizardi & Co.," which was established in London, and carried on a very extensive business with East Spain and the Continent generally, and dealt largely in bills upon foreign countries. In the month of February, 1873, the plaintiffs were, and for more than thirty years previously had been, the bankers of F. de Lizardi & Co., whose credit was extremely high. They had two accounts with the plaintiffs, namely a loan account and a drawing account, and down to the month of December in that year usually had a considerable balance in the plaintiffs' hands. Early in 1873 Lizardi began to get into difficulties, and on the 3rd of February in that year he overdrew his drawing account with the plaintiffs, being then, and having for some time previously been, also indebted to them on his loan account. From the 3rd of February down to the 12th, 1873, he obtained large additional advances from the plaintiffs upon securities of various kinds deposited with them, and on the 12th of February, at the close of the day, Lizardi was indebted to the plaintiffs in the sum of 83,436*l.* 13*s.* 8*d.*, of which 49,000*l.* was due on the loan account and 34,436*l.* 13*s.* 8*d.* upon the drawing account.

Early in February, 1873, the defendant was at Xerez, near

Cadiz, in Spain, and on the 11th of February, being desirous of having a remittance of about 2000*l.* made from London to Cadiz, he on that day, by telegraph, instructed Mr. Pritchett, who had the general management of the defendant's business in London during his absence, to purchase from Lizardi drafts on Cadiz to about the sterling value of 2000*l.* Accordingly on the same day, Tuesday, the 11th of February, Mr. Pritchett instructed Mr. Goodban, the defendant's bill broker, to apply to Lizardi for drafts on Cadiz to the amount of about 2000*l.* Mr. Goodban thereupon, on the same Tuesday, effected a contract between Lizardi and the defendant for the sale or delivery by Lizardi to the defendant of drafts to the amount of about 2000*l.* sterling, at an agreed rate of exchange, from London to Cadiz, to be at 15 days' date, and delivered the usual contract notes to the respective parties.

In the afternoon of the same day, the 11th of February, in pursuance of the above-mentioned contract, a clerk in the employment of Lizardi left at the defendant's office in London four drafts dated on that day, drawn by Francisco Lizardi in the name of F. de Lizardi & Co., upon Mr. Manuel Paul, Cadiz, for an amount in Spanish money equivalent at the aforesaid rate of exchange to 1999*l.* 3*s.* These drafts were forwarded by the evening post of the same day to the defendant, at Xerez, near Cadiz.

It is customary in London to pay for drafts and bills on foreign countries, purchased or obtained through a bill broker, on the post day next after the day of the contract. There are two post days, namely, Tuesday and Friday, in each week; consequently, according to the usual course of business, the purchase or consideration money for the four drafts so contracted for on Tuesday, the 11th, was payable on Friday, the 14th of February.

After banking hours on the 12th of February, the plaintiff, Bertram Wodehouse Currie, who for many days previously had been urgently pressing Lizardi to reduce the amount of his indebtedness to the plaintiffs, and who on that day for the first time suspected (as the fact was) that some of the securities deposited with the plaintiffs were not genuine, had an interview with Lizardi, and represented to him that he had a suspicion that some of the securities were not genuine, and again pressed Lizardi to reduce his balance. Lizardi assured Bertram Wodehouse Currie that he

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was mistaken in his suspicions, and handed him a list of the securities, detailing their values, and shewing a large margin over the plaintiffs' advances. Bertram Wodehouse Currie still pressed Lizardi to reduce his debt.

In the course of Thursday, the 13th of February, Lizardi paid into the plaintiffs' bank, to the credit of his drawing account, the sum of 6925*l.* 5*s.* 8*d.*, in two cheques for 425*l.* 5*s.* 8*d.*, and 6500*l.*; and about two o'clock on that day he handed to Currie, in the plaintiffs' bank parlour, in Lombard Street, the following document, partly written and partly printed, impressed with a penny stamp:—

"London, 14th February, 1873.

"M. Misa, Esq., 41, Crutched Friars.

"Please to pay to Messrs. Glynn, Mills & Co., or bearer, the sum of Nineteen hundred and ninety pounds, three shillings, for bills negotiated to you last post.

"F. de Lizardi & Co.

"1999*l.* 3*s.*"

The words in the document "for bills negotiated to you last post," refer to the four drafts previously mentioned. The plaintiffs, however, did not know by or upon whom the bills were drawn, but supposed that the money was due from the defendant to Lizardi for bills negotiated.

Bertram Wodehouse Currie deposed at the trial that it was usual for Lizardi to sell bills on the Exchange, and then to draw an order, like that above set out, on the purchaser of the bills, and that that is the course of business when bills are sold; and that such orders are sometimes accepted by writing "accepted" across them, that is, by the person on whom they are drawn writing his name across the paper, making it payable at his bankers.

In the course of the same day, Thursday, the 13th of February, cheques drawn and bills payable by Lizardi, to the amount of 8326*l.* 3*s.* 7*d.*, were presented to the plaintiffs' clerk, at the bankers' clearing-house, in London, for payment, and were left in the ordinary course of business in his hands. Bankers do not after 4 p.m. receive any cheque or bill for presentation at the clearing house, but they have the option of refusing to pay any cheque or

bill which may have been presented for payment during the day, and returning the same, unpaid, up to 5 p.m.

Shortly before 5 p.m. of the same Thursday, the plaintiffs gave orders to their clerk at the clearing-house not to pay the cheques or bills of Lizardi, which had been presented to the plaintiffs for payment in the course of the day, and thereupon the whole of them were returned unpaid, and Lizardi in this manner stopped payment. In fact the plaintiffs did not honour any cheques or bills of Lizardi, or pay anything on his account, after the 12th of February.

On Friday morning, the 14th of February, one of the plaintiffs' clerks left at the defendant's office in London a notice upon a printed form, of which the following is a copy:—

"Light gold cannot be received. A bill on [M. Misa] for [1999*l.* 3*s.* 0*d.*], drawn by [de Lizardi & Co.] (1) lies due at Messrs. Glyn, Mills, & Co., No. 67, Lombard Street. Please to call between two and four o'clock, and on Saturdays before three."

Between 2 p.m. and 3 p.m., of the same Friday, the plaintiffs sent one of their messengers to the defendant's office in London with the document dated February 14th, to inquire whether it would be paid. The messenger saw Mr. Pritchett, the defendant's manager, who stated that it would be paid; offered to give the messenger a cheque for the amount, and, with indignation, asked, "Why the question was asked?" The messenger replied that he did not know, and that he was not authorized to take the cheque. The messenger, taking back with him the document, then returned to the plaintiffs' bank, and there reported what had taken place at the defendant's office.

About an hour after the plaintiffs' messenger had left the defendant's office, Mr. Pritchett drew a cheque in the defendant's name upon his bankers, Barnetts, Hoares, Hanburys, & Lloyd, for the sum of 1999*l.* 3*s.*, payable to F. de Lizardi & Co., or bearer, which is the cheque sued on, and sent the same to the plaintiffs' bank by a clerk, who, shortly before 4 p.m. of the same day, Friday, handed the cheque to a clerk in the plaintiffs' bank and received the document dated February 14th in exchange, and

(1) The words and figures in brackets were written.

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thereupon the amount of the cheque was entered in the plaintiffs' books to the credit of Lizardi.

The plaintiffs, upon receiving the defendant's cheque, sent the same to the clearing-house, where, about 4 p.m. on the same day, it was presented for payment, and handed to a clerk of Barnetts, Hoares, Hanburys, & Lloyd.

At the time Mr. Pritchett sent the defendant's cheque to the plaintiffs' bank he did not know that Lizardi had stopped payment, but being very soon afterwards informed of the fact, he at once instructed the defendant's bankers not to pay the defendant's cheque, and the same was accordingly refused payment and returned unpaid to the plaintiffs before 5 p.m. on the 14th February, and the amount thereof was, on the morning of the following day, entered in the plaintiffs' books to the debit of Lizardi.

Up to this time the plaintiffs did not know whether Lizardi was solvent or not. At an interview which the plaintiff, Bertram Wodehouse Currie, had with him on the said 14th of February, he protested that he was solvent. This statement was doubted by Bertram Wodehouse Currie.

Shortly after the 13th of February, when Lizardi stopped payment he absconded, and was subsequently adjudicated a bankrupt, his liabilities amounting to upwards of a million sterling, and his assets amounting to very little indeed.

The document dated February 14th has never been returned to nor demanded by the plaintiffs, and is still in the possession of the defendant.

The following admissions in writing were made by the parties before the trial, namely:—That the four drafts purchased by the defendant from Lizardi as afore-mentioned were duly presented for payment to Manuel Francisco Paul, at Cadiz, on whom they were respectively drawn by F. de Lizardi & Co. on the day they respectively became due, and that they were then and there respectively refused payment and were respectively dishonoured by Manuel Francisco Paul, and upon the grounds (but without admitting the truth of the grounds) stated in the protest of the 27th of February, 1873; and that the bills were then and there duly protested for non-payment; and that the above facts, as also the

bills and protests, might be given in evidence without calling any witness or witnesses to prove them or any of them.

Some of the securities deposited by Lizardi with the plaintiffs were found to be forgeries, some worthless, and others cannot be realized. The plaintiffs have realized a portion of the said securities which were good, and taking into account the value of the residue, which cannot now be realized, the balance which will ultimately be due from Lizardi to the plaintiffs will be about 20,000*l.*

It was contended on behalf of the defendant at the trial that there was a total failure of consideration as between the defendant and Lizardi for the cheque sued on, and that the plaintiffs were not holders thereof for value; but the learned judge ruled upon the above facts (neither party desiring that any question should be left to the jury) that the plaintiffs were entitled to recover, and directed the jury to find a verdict for the plaintiffs for 2090*l.* the amount of the cheque and interest thereon, and a verdict for that amount was thereupon entered, with leave to move to enter a nonsuit.

In Hilary Term, 1874 (January 14th), the defendant moved the Court of Exchequer, pursuant to the leave reserved, for a rule calling upon the plaintiffs to shew cause why the verdict entered for them should not be set aside and the verdict entered for the defendant or a nonsuit.

The Court (Kelly, C.B., Pigott and Cleasby, BB.) refused a rule, and the defendant appealed.

The Court of Appeal is to be at liberty to draw inferences of fact from the facts above stated.

The question for the opinion of the Court of Appeal is whether a rule *nisi* ought to have been refused or granted.

Dec. 3, 1874. *W. Williams, Q.C.* (*Cohen, Q.C.*, and *Wood Hill* with him), argued for the defendant.

J. Brown, Q.C. (*Murray* with him), for the plaintiff.

The course of the arguments sufficiently appears from the judg-

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ment. The following cases were referred to:—*Crofts* v. *Beale* (1); *Young* v. *Cole* (2); *Swift* v. *Tyson* (3); *Brandao* v. *Barnett* (4); *Percival* v. *Crampton* (5); *Poirier* v. *Morris* (6); *Watson* v. *Russell* (7); *Whistler* v. *Forster* (8); Parsons on Notes and Bills, vol. i. p. 218.

Cur. adv. vult.

Feb. 11, 1875. The judgment of the Court (Keating, Lush, Quain, and Archibald, JJ., Lord Coleridge, C.J., dissenting) was delivered by

LUSH, J. This is an action on a cheque, dated the 14th of February, 1873, drawn by the defendant on Messrs. Barnett, Hoare, & Co., for payment of 1999*l.* 3*s.* to Lizardi & Co. or bearer. The material plea is the 5th, which alleges that there never was any consideration for the defendant's making or paying the cheque, and that the plaintiffs have always held the same without having given any consideration.

We think it must be assumed on the facts stated in the case that if the action had been brought by Lizardi, the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question therefore is whether, under the circumstances stated, the plaintiffs are to be considered the holders of the cheque for value.

The material facts bearing on this question may be briefly stated. The defendant had purchased of Lizardi & Co. bills on Cadiz, which were delivered to him on the 11th of February, and which, according to the usual course of business, were to be paid for on the next post day, the 14th. Lizardi was at this time largely indebted to the plaintiffs, who were his bankers, on both his drawing account and a loan account, and he had for several days previously to and again on the 12th of February been pressed for payment or further security. On the 13th he paid in various

(1) 11 C. B. 172; 20 L. J. (C.P.) 186.
(2) 3 Bing. N. C. 724.
(3) 16 Peters, at p. 16.
(4) 6 M. & G. at pp. 667–8.
(5) 2 C. M. & R. 180.
(6) 2 E. & B. 89; 22 L. J. (Q.B.) 313.
(7) 3 B. & S. 34; 31 L. J. (Q.B.) 304.
(8) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161.

cheques on account of the balance, and at the same time handed to the plaintiffs the document set out in paragraph 13 of the case, which is designated a "bill."

On the morning of the 14th notice of this "bill," described as lying due at the plaintiffs', was left at the defendant's office, and shortly afterwards the cheque in question was paid in by the defendant to the plaintiffs' bank, and the "bill" given up to him in exchange for it. The amount of the cheque was, together with the other cheques paid in by Lizardi, entered to the credit of Lizardi's account, and a large balance still remained owing to the plaintiffs. Soon after paying in the cheque the defendant heard that Lizardi had stopped payment, and he at once instructed his bankers not to honour the cheque. In consequence of this the cheque was returned from the clearing-house in the after-part of the day, and on the following morning (the 15th) it was entered in the plaintiffs' books to the debit of Lizardi's account.

The Court below, in giving judgment for the plaintiffs, proceeded, partly at least, upon the special circumstance that the cheque was given to take up the so-called "bill," and considered that this of itself formed a sufficient consideration to entitle the plaintiffs to recover. The argument before us, however, was addressed almost entirely to the broader question, namely, whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value. As this is a question of great and general importance, and as our opinion upon it is in favour of the plaintiffs, we do not think it necessary to say more with reference to the special circumstance adverted to, than that we are not prepared to dissent from the view taken upon this question by the Court below.

It will, of course, be understood that our judgment is based upon what was admitted in the argument, namely, that the cheque was received by the plaintiffs bonâ fide, and without notice of any infirmity of title on the part of Lizardi. We, therefore, for the purpose of the argument, regard the so-called "bill" as merely an authority to the defendant to pay the amount to Lizardi's bankers, instead of paying it to him, and treat the transaction as if the cheque had been paid to Lizardi, and he had paid it to

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the plaintiffs, not in order that he might draw upon it, but that it should be applied pro tanto in discharge of his overdrawn account.

It was not disputed on the argument, nor could it be, that if instead of a cheque the security had been a bill or note payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable. This has been established by many authorities, both in this country and in the American Courts. It has been supposed to rest on the ground that the taking of a negotiable security payable at a future day implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security. The counsel for the defendant accordingly contended that where the security is a cheque payable on demand, inasmuch as this consideration is wanting, the holder gains no independent title of his own, and has no better right to the security than the debtor himself had.

We should be sorry if we were obliged to uphold a distinction so refined and technical, and one which we believe to be utterly at variance with the general understanding of mercantile men. And upon consideration we are of opinion that it has no foundation either in principle or upon authority.

Passing by for the present the consideration of what is the true ground on which the delivery or indorsement of a bill or note payable at a future date is held to give a valid title to a creditor in respect of a pre-existing debt, and assuming that it is the implied agreement to suspend, it does not follow that the legal element of consideration is entirely absent where the security is payable immediately. The giving time is only one of many kinds of what the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other: Com. Dig. Action on the Case, Assumpsit, B. 1–15.

The holder of a cheque may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately he is safe. The maker of the cheque cannot afterwards

repudiate, and claim back the proceeds any more than he could claim back gold or bank notes if the payment had been made in that way instead of by cheque. This was decided in *Watson* v. *Russell* (1), with which we entirely agree. In very many—perhaps in the great majority of cases—cheques are not presented till the following day, especially where they are crossed, and this usage is so far recognised by law that the drawer cannot complain of its not having been presented before, even though the banker stop payment in the interval. The loss in such a case falls on the drawer of the cheque, and not on the holder.

It cannot, we think, be said that a creditor who takes a cheque on account of a debt due to him, and pays it into his banker that it might be presented in the usual course instead of getting it cashed immediately, does not alter his position, and may not be greatly prejudiced if his title could then be questioned, or that the debtor does not, or may not, gain a benefit by the holding over. If this subject were worth pursuing it would not, we think, be difficult to shew that there is no sound distinction between the two kinds of securities of which we have been treating. In the course of the argument it was put to the learned counsel for the defendant whether a debtor who gave his own cheque in payment of a pre-existing debt could defend an action upon it on the ground that the creditor was not a holder for value, and Mr. Watkin Williams admitted that his argument must go to that extent, and yet it has always been the practice to sue in such a case on the cheque as well as on the original debt, and no such defence has, as far as we are aware, ever been attempted to be set up, certainly not successfully.

But it is useless to dilate on this point, for, in truth, the title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the Court of Common Pleas in *Belshaw* v. *Bush* (2) as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized.

(1) 3 B. & S. 34; 31 L. J. (Q.B.) 304. (2) 11 C. B. 191; 22 L. J. (C.P.) 24.

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This is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had given no security. The books are not without authorities in favour of this view, although the point has not, as far as we are aware, been directly decided. Story lays it down in his work on Promissory Notes, s. 186, that a pre-existing debt is equally available as a consideration as is a present advance or value given for the note, without suggesting any distinction between a note payable after date and one payable on demand; and the cases of *Poirier* v. *Morris* (1), *Watson* v. *Russell* (2), before cited, *Whistler* v. *Forster* (3), and others, contain clear expressions of opinion the same way.

On the part of the defendant the case of *Crofts* v. *Beal* (4) was strongly relied on, where it was held that a promissory note given by a surety for payment on demand without any new consideration was nudum pactum. It is sufficient to say of that case that the note was payable to the plaintiff, and not to order or bearer, and was not therefore a negotiable security. *De la Chaumette* v. *Bank of England* (5) appears at first sight to be more in point, but there, although it appeared as between the plaintiff and O., by whom the bank note in question was remitted, that the state of account was in favour of the plaintiff, it is not really so, for the note had not been remitted in payment, but merely for collection

(1) 2 E. & B. 89; 22 L. J. (Q.B.) 313.

(2) 3 B & S. 34; 31 L. J. (Q.B.) 304.

(3) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161.

(4) 11 C. B. 172; 20 L. J. (C.P.) 186.

(5) 9 B. & C. 208.

as agent, and the Court held that under these circumstances the plaintiff had no better title than O. For these reasons we are of opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand, and that, therefore, the judgment of the Court below ought to be affirmed.

My Brother Quain, who concurs in the judgment, desires to add that he does not adopt all the reasoning as to consideration.

LORD COLERIDGE, C.J. In this case I am unable to assent to the conclusion at which the other members of the Court have arrived. I am painfully conscious of the great weight of authority against me, but as at last I remain unconvinced, it is my duty to say so, and also shortly to say why.

I need not repeat, because I entirely assent, and cannot add to the statement of the facts of the case, with which the judgment prepared by my Brother Lush sets out.

I proceed to consider the law, assuming the perfect correctness of the facts as stated by him, and being of opinion that on those facts the fifth plea is made out, and that the defendant is entitled to our judgment.

It is important to state what I understand to be the exact proposition contended for by the defendant, and, as I think, contended for rightly. It is this:—If the drawer of a cheque pay it into a banker to the account of a third person, and the consideration as between the person to the credit of whose account the cheque has been paid and the drawer of the cheque wholly fails, so that as between those two parties the drawer would have a perfect answer to any action on the cheque, then the drawer may stop payment of, and has an answer to any action on, the cheque, as against the bankers who have received it, unless in the meantime they have in some way given some value for it; as by paying money, or giving credit or some other advantage, to the customer to whose account it has been paid in, or by altering their own position in some way in consequence of having received the cheque and on the faith of its being paid.

Now, it is too late to dispute that a pre-existing debt due to the

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transferee of a bill entitles him to all the rights of a holder for value. But it seems equally clear that this is an exception to general rules, an extraordinary protection given to such a holder on grounds of commercial policy only, and in order to favour the unrestricted use as currency of negotiable instruments. "It is," says Chancellor Kent, in the well-known case of *Bay* v. *Coddington* (1), "the credit given to the paper, and the consideration bonâ fide paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." Mr. Justice Willes uses language very much the same in *Whistler* v. *Forster*. (2) "The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: Nemo dat quod non habet. To this there are some exceptions, one of which arises out of the law merchant as to negotiable instruments. These being part of the currency are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud, which would have rendered it unavailable in the hands of a previous holder." It would be wasting time to quote other authorities to the same effect: these are sufficient to shew the grounds of sense and substance on which the law as to bills is supported. Nor, if it be necessary to have recourse to it, is the technical element of consideration wanting between the transferor and the transferee of such an instrument. Whether the true view be that adopted by Sir John Byles (Byles on Bills, 10th ed., p. 39), that a bill or note payable at a future day suspends until its maturity the remedy for the antecedent debt; or that adopted by my Brother Lush, from the judgment of the Court of Common Pleas in *Belshaw* v. *Bush* (3), that it is a conditional payment of the debt, the debt reviving if the security is not realised; in either view there is consideration which may enter into but is not the whole reason for the protection given to the bonâ fide holder of such an instrument. The whole

(1) 5 Joh. Ch. Ca. 54. (2) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161.
(3) 11 C. B. 191; 22 L. J. (C.P.) 24.

reason certainly does not apply to the case of a cheque, and the true question, with deference, appears to me to be whether, apart from the reasons which protect the bonâ fide holder of bills payable at a future day, which do not apply, there are any reasons or authorities which do apply to protect the bonâ fide holders of cheques given under such circumstances as the cheque was given in this case.

As to authority, no case has been cited in which this point has been decided, yet it is certain that a case would have been cited if it could be found. There is, indeed, a dictum of the Lord Chief Justice of the Queen's Bench, in *Watson* v. *Russell* (1), to the effect that there is no difference between a bill and a cheque in the hands of a holder for value. But that dictum must be taken with the facts of that case, in which neither was the plaintiff a banker, nor was the consideration for the cheque an antecedent debt. No authority, as I have said, has been cited on which the point has been decided. Yet it surely needs one. The doctrine as to bills of exchange has been established after many disputes and much resistance; is it likely that in the case of cheques no one who has been defrauded has ever resisted payment until now, but that everyone has so felt the sense and reason of the rule contended for, that it has been acquiesced in without a struggle? I think not, and I cannot find, on the best information I have been able to get, that the general understanding is what my Brother Lush believes it to be. On the contrary, my impression is that the opinions of men of business are much divided on this subject, and that if the Court were to decide, as I think it ought, in favour of the defendant, the consequences to mercantile transactions would be by no means so serious as it has been too much taken for granted they would be. And even if the matter of fact were clearer than it is, the understanding of mercantile men, though on such a subject entitled to deference, cannot and ought not to determine the question. Apart, then, from authority, which is wanting, how stands the thing in sense? I take a case of gross and direct fraud, for to such a case the argument, if it is good for anything, must extend. A man is cheated

(1) 3 B. & S. 34; 31 L. J. (Q.B.) 304.

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out of a cheque for a large sum in favour of A.; A., who has cheated him, pays the cheque into his bankers, between whom and himself there have have been large dealings greatly to the bankers' advantage. At the moment when the cheque is paid in, A. is overdrawn, and thereupon, nothing more happening, the banker claims the value of the cheque against the cheated drawer, and denies the drawer's right to protect himself against the fraud of A. by stopping his cheque, simply and solely on the ground that the fraudulent man has been allowed by the banker to overdraw his account. I can see no reason or justice in this. If either the drawer or the banker must suffer to the extent of the value of the cheque, it seems to me much more reasonable and just that he should suffer who, with his eyes open, and to a person he knows, has gone on making advances, than he who has been directly defrauded, often in a first and single transaction, and also has often no means whatever of protecting himself against fraud. To me the rule seems hard in the case of money, but it is well settled. It seems hard in the case of bills due at a future date, which are said to be like money, and to stand upon the same foot; but that is also well settled. But cheques are not money; no rule, as far as I can find, either of practice or of law, is settled with regard to them, and I am not willing to make a rule as to cheques in favour of bankers which is not just in itself, and which is not defensible, at least upon the grounds on which the rules as to money and as to bills are defended.

It is said that the distinction between a bill and a cheque is a refined one, but it is to be observed, first, that where a line is drawn, cases close to this line, but on different sides of it, must needs be separated by a distinction which is refined; and next, that we are here dealing with an exception to a general rule, and the burden of proof and stress of argument seem to me to lie rather on those who say, than on those who deny, that it is within the exception. It is for those who assert it to make it out, and the absence of direct affirmative authority in such a case is, to my mind, strong authority in the negative.

It has, however, been argued that the legal element of consideration is not entirely absent where a cheque is given, because

it is payable immediately; and my Brother Lush has put together, from Comyns's Digest, Action on the Case, Assumpsit, B. 1–15, a definition or description of consideration, to the accuracy of which I entirely assent. It is sought to draw from this definition the conclusion that the practice, by no means uniform or binding, of allowing twenty-four hours to elapse between the drawing or receipt and presentment of a cheque constitutes a new consideration as between the drawer and the payee. I cannot assent to this view. It assumes the substantial identity of a cheque with other instruments from which it differs. "A cheque," says Mr. Justice Story, Promissory Notes, 6th ed. p. 674, "is an absolute appropriation of so much money in the hands of a banker to the holder of the cheque, and there it ought to remain until called for. In truth," he goes on, "a cheque is an instrument sui generis, and is construed exactly as the parties intend it. It is supposed to be drawn upon funds in the hands of the banker as banker, and it appropriates the amount to the holder of the cheque." To the same effect is the judgment of Sir John Byles in *Keene* v. *Beard* (1): "A cheque is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person;" and in commenting on *De la Chaumette* v. *Bank of England* (2), the same learned person draws the very distinction which is insisted upon here in the defendant's favour. "It would seem to follow," says he (Byles on Bills, 10th ed. p. 39), "as a general rule, that whenever a bill or note payable on demand is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it: a doctrine which, while it cannot injure the creditor (for if he cannot recover, still he is but where he was before he received the remittance), would no doubt tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors; but it is conceived that in general a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value." And in a note to this passage he

(1) 8 C. B. (N.S.) at p. 381; 29 L. J. (C.P.) 287.
(2) 9 B. & C. 208.

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observes: "It is to be recollected that a *bill* or note payable at a future day suspends till its maturity the remedy for the antecedent debt. There may, therefore, in this respect be a difference between an instrument payable on demand and one payable at a future day."

There is, therefore, nothing to bind a banker not to present a cheque paid in till the next day. In practice, I believe it happens constantly that they are presented at once. Although, therefore, there may be an expectation of forbearance for twenty-four hours upon the giving of the cheque, the giving of it is no consideration to forbear, and it is fallacious to confuse things in their nature different.

There are not, as we have seen, any cases directly upon cheques, but there are some upon the subject of bank notes, to which it may be proper to advert. In *Solomons* v. *Bank of England*, which is reported in a note to *Lowndes* v. *Anderson* (1), the plaintiffs were London merchants in advance to foreign correspondents. A note had been fraudulently obtained, and had been stopped at the bank by the person defrauded. The plaintiffs were innocent of the fraud, and had received the note to be applied in diminution of an existing debt. There was evidence to connect the foreign correspondents with the fraud; and Lord Kenyon held, at nisi prius, and the King's Bench afterwards supported the ruling, that the London merchants had given no consideration; that they were, therefore, mere agents to receive the amount of the note from the bank; that they could be in no better position than their principals; and, as Mr. Justice Buller expressed it in banco, "they must stand or fall by the title of their foreign correspondents." This case was decided in 1791, and it came under the consideration of the King's Bench in 1829, in the case of *De la Chaumette* v. *Bank of England*. (2) In that case two bank notes had been fraudulently obtained, and were remitted from abroad to the plaintiff, an English merchant, who was, at the time he received them, largely in advance to the foreign remitter. It was held by Lord Tenterden and the Court of King's Bench, that the plaintiff could only recover on the title of the foreign sender. "It appeared," says Lord Tenterden, giving the judgment of the Court,

(1) 13 East, 135. (2) 9 B. & C. 208.

"that at the time when the note was remitted to the plaintiff the balance as between him and Odier & Co., the foreign senders, was 7000*l.* in favour of the plaintiff; but he did not, in consequence of having received the note, make any further advance or give any further credit to Odier & Co., than he would have done if the note had not been transmitted. Unless, therefore, we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to whom he is indebted, enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co., and that, if he can recover at all, it must be upon their right." A Bank of England note is not a cheque, no doubt, but neither is a cheque an unmatured bill. To hold that the plaintiffs cannot recover in this case, except on Lizardi's title, and that they were his agents to receive the defendant's cheque, is not in conflict with any of the cases which have been decided on bills of exchange, while it is, I think, in accordance with the principles of the two cases I have last mentioned, as well as with real justice.

I am not aware that these cases at all interfered with the negotiability of bank notes; and I do not think that the negotiability of cheques will be injured if this case were decided as I should wish to decide it.

There remains the smaller question whether the special circumstance that a so-called "bill" was given up on receipt of the cheque formed of itself a sufficient consideration to entitle the plaintiffs to recover? I need say no more than that I think it did not. The so-called bill was not a bill, it was a mere memorandum and inchoate, and its relinquishment was the giving up of nothing which can be called a consideration. For these reasons I am of opinion that the judgment of the Court below should be reversed.

Judgment affirmed.

Attorneys for plaintiffs: *Murray, Hutchins, & Co.*
Attorneys for defendant: *Dawes & Son.*

END OF HILARY TERM, 1875.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXVIII VICTORIA.

1875
April 26.

LORD ZOUCHE *v.* DALBIAC.

Heriot Custom—Statute of Limitations—3 & 4 *Wm.* 4, *c.* 27, *ss.* 1, 2, 3, 34, 42.

To an action of trespass for seizing and taking a horse, the defendant pleaded an immemorial custom for the lord of the manor, upon the death of a free tenant, to seize the best beast of which the tenant died possessed, wherever it could be found, and that, in 1873, on the death of a tenant, the defendant, as lord of the manor, took the horse under this custom. Replication, that more than twenty years before the heriot in question became due, a heriot became due, for which the then lord of the manor, through whom the defendant claims, did not seize, though he could have done so; that the then lord, whilst entitled, discontinued the taking of heriots; that no heriot had since been taken until the trespass complained of; that the right to make an entry or distress or bring an action to recover heriots, at the time of such discontinuance then first accrued to the then lord within 3 & 4 Wm. 4, c. 27; and that such right so first accrued more than twenty years before the death of the tenant or the trespass complained of. On demurrer:—

Held, that the replication was bad, since the seizure by the defendant was not making an entry or distress, nor bringing an action to recover rent within the meaning of 3 & 4 Wm. 4, c. 27, ss. 2, 3, and 34, and that the defendant's title to heriots therefore was not barred by the lapse of twenty years.

Quære, whether, notwithstanding the interpretation of "rent" in s. 1, heriot service and heriot custom, or either of them, are within the enactments of ss. 2, 3, 34, and 42.

THE plaintiff declared in trespass for seizing and driving away

two horses belonging to the plaintiff, and converting them to the defendant's use.

Plea, that the defendant was seised of the manor or lordship of Thakeham, in Sussex, in fee, and that Baron Zouche, now deceased, before and at his death was a free tenant of the manor, and seised of two freehold tenements within the manor in fee, and held the tenements of the defendant, the lord of the manor, by certain rents and services parcel of the manor; that within the manor there was, and from time whereof, &c., had been, an ancient custom for the lord of the manor for the time being to have and take, of right, upon and after the death of every free tenant dying solely seised of any freehold tenement holden of the lord of the manor, the best beast or beasts which were the property of such tenant at the time of his death, one such beast being had and taken in respect of every such tenement, as a heriot; that the lord of the manor for the time being, during all the time whereof, &c., had been accustomed to seize the best beast or beasts of every such free tenant at the time of his death, for such heriot or heriots, for such tenement or tenements, wheresoever such beast or beasts had been or could be found; that on the 2nd of August, 1873, the said Baron Zouche, being so seised of the tenements as aforesaid, died seised of such his estate therein, and at the time of his decease was possessed of the horses in the declaration mentioned as of his own proper horses, which horses were his two best beasts, wherefore, afterwards, to wit, on the 24th of October, 1873, the defendant, as lord of the manor for the time being, seized and took the horses, and carried away and detained them as two heriots, one in respect of each of the two tenements, as he lawfully might.

Replication, that more than twenty years before the death of the said Baron Zouche, the lord of the manor for the time being, through and under whom the defendant claims his estate and interest in the same, being then, in respect of the same estate and interest therein claimed by the defendant, in receipt of the rents, heriots, and profits thereof, while so entitled thereto, discontinued the taking and receipt of heriots in respect of each of the tenements, and that no heriot had since been seized, taken, or received in respect of either of the tenements until the seizure and

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taking of the horses in the plea mentioned; that the right to make an entry or distress or bring an action to recover heriots in respect of each of the tenements then at the time of such discontinuance first accrued to the lord of the manor, through whom the defendant claims, within the meaning of the Act 3 & 4 Wm. 4, c. 27, and that such right so first accrued more than twenty years next before the death of the said Baron Zouche, and before the seizure or taking of the said supposed heriots or either of them respectively.

Demurrer to the replication and joinder.

Manisty, Q.C. (*C. Elton* with him), for the defendant. Sections 2, 3, and 34 of 3 & 4 Wm. 4, c. 27, on which the plaintiff must rely, do not apply at all to heriot custom. But, assuming that they do, the replication is ambiguous and misleading, being drawn so as to meet the requirements of s. 3, yet without stating any facts from which the Court can judge whether the "discontinuance" is such a discontinuance as is meant by the statute, or whether the lord ever had an opportunity of seizing heriots within the time mentioned, or how and when any right accrued and was exercised or abandoned.

[After some discussion the counsel agreed upon the following written statement: "For the purpose of the demurrer it is to be taken as an admitted fact that more than twenty years before the heriots in question became due, a heriot in respect of each of the two tenements became due, for which the lord did not seize, although he could have done so." The Court then called on—]

J. Brown, Q.C. (*J. Digby* with him), for the plaintiff. The question is whether heriot custom is within the scope of 3 & 4 Wm. 4, c. 27, ss. 2, 3, and 34. If it is, the replication is good, and the defendant's title to heriots is extinguished for ever; for it is now admitted that more than twenty years before 1873, when the trespass sued on was committed, a death occurred, upon which the right to take a heriot accrued to the then lord of the manor, and was not exercised. Suppose this was in 1850, the twenty years begin to run from that time. If a death occurs, and the right again accrues before the twenty years have run out, say in 1865, the lord may exercise the right and save the extinguishment of the

title, but if the twenty years elapse without a death happening, the title is barred for ever. In *Owen* v. *De Beauvoir* (1) the defendant was entitled to an ancient quit-rent, payable annually at Michaelmas out of certain land held of his manor. All the rent which accrued due up to Michaelmas, 1824, was duly paid, the last payment having been made on the 15th of January, 1825. No rent was paid after that date, and on the 15th of May, 1845, the defendant distrained for six years' arrears of rent accrued due up to Michaelmas, 1844. The Court held that the twenty years began to run from the 15th of January, 1825, and that the title to the rent was extinguished by ss. 2, 3, and 34. It is true the Court seemed to think that heriots might not be within those sections, but this dictum was not confirmed by the court of error (2) when affirming the decision of the Court below. The object of the statute being to limit title to land, rent, and other subjects of property, it was not likely that heriots would be excluded. Scriven on Copyhold, 4th ed. p. 369, speaking of heriots, says: "The service is a badge of the feudal system, and may at the present day be deemed the most, if not the only obnoxious part of copyhold tenure." And in *Croome* v. *Guise* (3) the Court said: "Upon general principles the custom of heriots is not a custom to be extended in favour of the lord." So 1 Cruise, Dig. tit. 10 Copyhold, ch. 4, s. 63, says: "The Court of Chancery will not interpose in favour of the lord in the case of heriots, because the custom is unreasonable, the loss a family sustains being thereby aggravated"—citing *Wirty* v. *Pemberton*. (4) Then we have the positive words of s. 1: "The word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made." This must be read with a comma after "heriots," so that the words "for which a distress may be made," may apply only to "services and suits," and not to "heriots," otherwise we should be driven to the absurd anomaly of holding that the statute intended "rent" to include heriot service, but not heriot custom; for the remedy for heriot service is by distress, but heriot custom is said to lie in prender only, and not in render, therefore "the lord cannot distrain for it, except as it should seem by special custom:" 1 Scriven, Cop. 375, citing authorities. The same author, at p. 388, says: "Heriot

(1) 16 M. & W. 547.
(2) 5 Ex. 166; 19 L. J. (N.S.) (Ex.) 177.
(3) 4 Bing. N. C. 148, 160.
(4) 2 Ab. Eq. Ca. 279.

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custom may be seized by the bailiff or other officer of the manor for the lord's use, wherever it may happen to be found, whether upon or in any place out of the manor; and if it be eloigned, the lord may have trover or detinue for it, for the law adjudgeth possession in him without seizure." Therefore the language of 3 & 4 Wm. 4, c. 27, "an action to recover rent," will apply to the remedy for heriot custom. *Chichester* v. *Hall* (1) does not touch the present case, for there the lord was tenant for life.

Manisty, Q.C., was not heard in reply.

KELLY, C.B. This is an action of trespass for seizing and taking two horses, and the defendant pleads a justification on the ground that he had the right to seize the horses as heriots, one in respect of each of two tenements held by the plaintiff as tenant to the defendant, the lord of the manor within which the tenements are. The question for us is, whether that right is destroyed by 3 & 4 Wm. 4, c. 27. By the interpretation clause, s. 1, it is enacted, that "the word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except," &c. The earlier part of this clause says "that the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows;" and this exception is important, since it is the definition of "rent" in this section, which is said to have the effect of taking away the defendant's right to the heriots.

By s. 2, it is enacted, "that after 31st December, 1833, no person shall make an entry, or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims." Now if we look to the literal meaning of the words, it would be enough to say that the act complained of in this declaration was neither an "entry" nor a "distress," nor "an action to recover any land or rent," but a seizure of two horses.

The same remark occurs on reading s. 3: "In the construction

(1) 17 L. T. 121.

of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; that is to say, when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received." Unless there be some authority for the proposition, I can see no reason for applying the words "make an entry or distress, or bring an action to recover any land or rent" to something which is neither the one nor the other.

A similar observation applies to s. 34, which enacts "that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

When, therefore, we look at the literal words of these sections, it is enough to say that but for s. 1, the present case would clearly not be within the statute. The Court of Exchequer seems to have been of this opinion, as appears from their judgment in *Owen* v. *De Beauvoir* (1), delivered by Parke, B. No authority or dictum has been cited that heriots are within these sections, though one would have expected the case to arise more than once since 1833, the date of the statute. In considering the spirit of the statute, we must remember the essential difference between the nature of rent and of a heriot. "Rent" is a noun of multitude, meaning not one single sum due at some one moment, which may be recovered by action, and may be lost if not, but meaning a succession of sums of money payable in general yearly or at shorter intervals during the whole term specified. A heriot is a right to take a specific chattel, a right arising either upon death or alienation, in a manor. It is not of a continuous nature. To

(1) 16 M. & W. 547, 566.

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apply to such a subject words in the statute which are applicable only to continuous payments would be to disregard the principle and spirit of the statute; and to apply such words to a case in which no opportunity may occur of enforcing the right for perhaps twenty, thirty, or forty years, would seem to be a total departure from the intention of the legislature.

In the judgment of this Court, delivered by Parke, B., in *Owen* v. *De Beauvoir* (2), the following passage occurs:—"Another difficulty was pointed out, and much insisted on at the Bar, namely, that on the construction which we adopt great injustice would necessarily result in the ordinary case of heriots and other similar rights, which become due at uncertain intervals; and also the possible, though not very probable, case of a rent reserved payable every twenty years or at a longer interval. In such cases, if the twenty years are to be calculated from the last payment, a party, it was argued, will lose his right without any default or laches whatever when the rent is payable at intervals greater than twenty years, and it is shortened to less than a year where it is payable every twenty years; and no doubt great difficulty may exist in dealing with such cases." Now the present case is much stronger than the case of rent payable every twenty years, because the intervals between the times when the right to take a heriot occurs may be much more than twenty years. The judgment proceeds: "But as to heriots, probably the answer to this objection may be that in a case similar to that now before us the word 'rent' would not include heriots—for though by the interpretation clause the word 'rent' is made to include heriots, yet that is only where the nature of the provision or the context does not exclude such a construction; and it may be that the injustice pointed out would afford ground for holding that in the clause now under consideration the word 'rent' does not include heriots. A similar observation may be made upon the case of rents payable at greater intervals than twenty years, and this may be considered either as falling under the general enactment in s. 2, so that each particular heriot or amount of rent due may be recovered within twenty years, or is not provided for by the statute at all and is left in the same condition as if the Act had not passed." It is unnecessary for our present judgment to go so far as to say that no case could

(1) 16 M. & W. at p. 566.

arise in which "rent" in the statute would include heriots. Bearing in mind the qualification imposed in s. 1 upon the meaning of rent—"except where the nature of the provision or the context of the Act shall exclude such construction"—it is enough to say that upon the facts before us the nature of the provision excludes the application of these sections to the taking of the heriots in question. This view receives confirmation from s. 3, the effect of which, according to *Owen* v. *De Beauvoir* (1), is, that the time when the right to bring an action to recover rent shall be deemed to have accrued, shall be the last time at which any rent was received. If, therefore, "rent" in that section includes heriots, the twenty years begin to run, not from the time when the heriots became due and the lord failed to enforce the right, but from the time when the last heriot was taken, so that if the last heriot was taken in 1850 and no death occurred till 1873, the lord's title would be barred under s. 34, though he had had no opportunity of exercising his right.

The view we take is fortified by the consideration of s. 42, which enacts that, "after the said 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." Now if "rent" does anywhere in the statute include heriots, it may be in s. 42, so that the meaning may be that the heriots, the right to which accrued in 1873, cannot be recovered after six years from the time when they became due. However that may be, which it is not necessary to determine now, it is clear that the defendant was justified in taking these heriots, and that the replication is bad.

BRAMWELL, B. I am of the same opinion. I cannot say that there was not some general intention present to the minds of those

(1) 16 M. & W. 547, 566.

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who were parties to this legislation that heriots should be within the provisions of the statute. The principal enactment of the statute is contained in s. 2, the remaining sections up to s. 29 inclusive being explanatory of s. 2. Then come ss. 30—41, dealing with particular subjects, and then comes s. 42. Now, it is strange, if the framer of the statute intended heriots to be within s. 42 only, and not within ss. 2, 3, and 34, that he should say, as he does in s. 1, that "the word 'rent' shall extend to all heriots." I should have thought that he would not have mentioned heriots at all till he came to s. 42; and there is some difficulty in saying that s. 42 applies to heriots, because "arrears of rent" and arrears of heriots are very different things. I therefore doubt—but I give no opinion on the point—whether it was the general intention of the framer of the statute to bar not merely the right to a particular heriot, but the title generally. Though it is very likely that the framer had some general intention with regard to heriots, yet if he had, he has not used apt provisions for carrying out the intention. And he would see it was unjust to comprise heriots in the general words of ss. 2, 3. If he had intended to bar the title, he ought to have enacted as he has done in the case of advowsons, in ss. 30–34. It is not enough that a patron should omit to present to a benefice once, there must be three omissions in succession, or a lapse of sixty years, before a patron is to lose his right. If, therefore, it had been intended to bar the title to heriots, one would have expected that, instead of making it depend on whether a heriot was taken on one occasion—which might make it depend on whether there happened to be an animal worth seizing or whether some wrongdoer, who was not worth suing, removed it—the legislature would have made it depend on whether a certain number of omissions to seize had occurred, or whether some such period as sixty years had elapsed, as in the case of advowsons. Though, therefore, it is likely that there was some general intention of making the title to heriots barrable, yet as there are no particular words applicable to seizing heriots, I do not think such a case as the present can have been in the mind of the legislature, and happily there are no general words which comprehend the right to seize heriots.

The question for us turns on s. 2: "No person shall make an

entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims." If we are to read "rent" there as including heriots (I think we ought not, but supposing we ought) the effect will be that wherever in order to recover a heriot it is necessary to bring an action, the section applies and the right is barred. But the section does not say that no person entitled to seize heriots shall seize heriots but within twenty years next after the time at which the right to seize shall have first accrued, and there is, therefore, no prohibition against doing what the defendant has done here and what he might have done before the passing of the statute. It would be monstrous if, owing to the accident that no tenant dies and no occasion for taking a heriot arises for more than twenty years, the right should be for ever extinguished. I think if the legislature had intended to deal with such a case they would have provided as they did in the case of advowsons.

There is another consideration derived from s. 42. If the words in that section, "no arrears of rent .... shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due," include arrears of heriots; and if the lord lets six years go by after a heriot becomes due without enforcing his right, he cannot recover that particular heriot; and if the right does not occur again within the next fourteen years, then, supposing the plaintiff's construction of the statute to be correct, the right is gone for ever. For let the lord do what he may—unless he kills the tenant—he cannot during those fourteen years prevent his title being barred. Such an effect cannot have been intended, and there is great additional weight derived from the opinion of this Court in *Owen* v. *De Beauvoir*. (1)

The conclusion, therefore, to which I come is, that whatever the general intention of the legislature may have been, they did not intend to touch this particular case; or that if they did they have not expressed their intention in words, for there is nothing in s. 2 to prevent the defendant doing what he has done, and what before the statute he had a right to do.

(1) 16 M. & W. 547, 566.

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POLLOCK, B. I am of the same opinion. For the reasons given by my Brother Bramwell, I think heriots are not within the spirit of ss. 2 & 3. What the defendant did was neither "making an entry on land" nor "making a distress." Nor was it an action to recover a heriot. The character of heriots is well illustrated in Viner's Abr. tit. Heriot (E): "Prescription to distrain for heriot custom if it be eloign'd is not good; for he may have an action against whomsoever eloign'd it; and by this it seems that he may have an action of detinue against him who detains it; for he has a property in the thing, and therefore, because it is transitory, the law adjudges *possession without seisin* as of the body of a Ward. Br. Heriots, pl. 9."

AMPHLETT, B. I am of the same opinion. I think our judgment can be justified consistently with both the letter and the spirit of the statute. I agree with Mr. Brown that the words in the interpretation clause "the word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made," must be read with a pause after "heriots," and that the words "for which a distress may be made" do not extend to "heriots." The clause, therefore, will be read as if it were "all heriots, whether customary or otherwise;" but subject to this qualification, "except where the nature of the provision or the context of the Act shall exclude such construction." Now, "rent" is used in two different senses in this statute. Its meaning in s. 2 was decided in *Grant* v. *Ellis*. (1) In the judgment of the Court, delivered by Rolfe, B., it is said: "The defendant contends that the word "rent" in s. 2 of the statute cannot be taken as having any reference to rents such as that now in question, viz., rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation, but must be confined to rents existing as an inheritance distinct from the land, and for which, before the statute, the party entitled might have had an assise such as ancient rent service, fee farm rents, or the like. We accede to this latter view of the case." The judgment then proceeds to give the reason for this construction of the word

(1) 9 M. & W. 113, 122.

"rent." Following this view, "rent" in ss. 2, 3 cannot include heriots, for a heriot is certainly not a rent "existing as an inheritance distinct from the land."

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Judgment for the defendant.

Attorney for plaintiff: *E. Byrne.*
Attorneys for defendant: *Parkers.*

THE GUARDIANS OF HALIFAX UNION *v.* WHEELWRIGHT.

May 8.

Treasurer to Guardians—Banker and Customer—15 & 16 *Vict. c.* 59, *s.* 19—*Forged Indorsement—Negligence in drawing Cheques.*

The defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the Orders were cashed like cheques payable to order. The defendant received no salary or remuneration, and the guardians received interest on their balance when it exceeded 3000*l.*

A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank.

On a case stated by an arbitrator in an action brought by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature:—

Held, first, that the negligent drawing of the orders disentitled the plaintiffs to complain of the payment of the excess;

Secondly, that as to the payment on forged indorsements the account at the bank was in effect the plaintiffs' account; that the bank was protected by 16 & 17 Vict. c. 59, s. 19; and that as by the act and direction of the plaintiffs the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and further, that if the account at the bank were regarded as the defendant's account, still being so kept by the order of the plaintiffs, they could not make any claim against him which he could not enforce against the bank.

SPECIAL CASE stated by an arbitrator.

The defendant was the treasurer to the plaintiffs, appointed

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under the Poor Law Consolidated Order of the 24th of July, 1847. (1)

The defendant was the salaried manager of the Halifax Commercial Banking Company, Limited, and was appointed treasurer because it was considered desirable by the guardians that the treasurer should be a bank manager. No express remuneration or salary was assigned to him as treasurer, nor did he receive any profit from the use of the money left in his hands. (2)

When the defendant was first appointed treasurer the plaintiffs' accounts were kept in a common pass-book headed "Guardians of Halifax Poor Law Union in account with the Halifax Commercial Banking Company, Limited." The account was afterwards kept in a treasurer's book, according to the form prescribed by the Poor Law Orders (1), but no change was made in the bank ledger.

The sums deposited by the plaintiffs were dealt with by the bank in every respect in the same manner as funds deposited with them

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(1) By Arts. 153, 154, the guardians are to appoint a treasurer, who is to perform the duties imposed on him by the orders.

By Art. 203, the duties of the treasurer are (inter alia) "1. To receive all moneys tendered to be paid to the guardians, and to place the same to their credit; 2. To pay out of any moneys for the time being in his hands belonging to the guardians all orders for money which shall be drawn upon him in conformity with Art. 84, when the same shall be presented at the house or usual place of business of the treasurer, and within the usual hours of business; 3. To keep an account, under the proper dates, of all moneys received and paid by him as such treasurer, to balance the same at Lady Day and Michaelmas in every year, and to render an account of such moneys to the guardians when required by them to do so." By Art. 204 the regulations of Art. 203 are not to be applicable to cases in which the Governor and Company of the Bank of England may act as treasurer of the union or bankers to the guardians.

By Art. 84, "the guardians shall pay every sum greater than 5*l.* by an order, which shall be drawn upon the treasurer of the union, and shall be signed by the presiding chairman and two other guardians at a meeting, and shall be countersigned by the clerk;" the form of the order is fixed by Art. 1 of the General Order of April, 1857.

By the General Order for Accounts (14th of Jan. 1867), Art. 18, "The treasurer shall keep punctually and accurately a book according to the form set forth in sched. D., hereunto annexed, in which shall be entered an account of all moneys received and paid by him on account of the guardians," which he is to balance quarterly, and lay before the guardians once a month.

(2) By Art. 174 of the Consolidated Order, 1847, "If no remuneration or salary be expressly assigned to the treasurer, the profit arising from the use of money from time to time left in his hands shall be deemed to be the payment of his services."

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by other customers. It was understood that when the balance to the credit of the guardians exceeded 3000*l.* interest in respect of it should be allowed by the bank; and during the period when the transactions in question took place the guardians were on several occasions credited with sums of money as interest, which were entered in the treasurer's book as payments to their credit by the bank.

The course of business between the plaintiffs and the defendant was, that sums of money were from time to time paid to the account of the plaintiffs across the counter to the bank clerks, and the orders signed on behalf of the plaintiffs were cashed like cheques payable to order.

The orders were drawn upon the defendant, and were signed and countersigned in conformity with Art. 84 of the Poor Law Orders (1), and were upon forms, the material parts of which were as follows:—"Pay to , or order, the sum of pounds, shillings, and pence, and charge the same to the account of the said guardians," with a place for the figures in the left-hand corner, as in an ordinary cheque.

Barstow, the clerk to the plaintiffs, had in his employment a clerk named Laidler, whose duty it was to fill up the orders. Laidler drew a large number of orders in such a way, that after they had been duly signed and countersigned, the amounts could be increased; and he did accordingly increase the amounts, sometimes by adding the syllable "teen" after the written number of pounds, and sometimes by inserting the words "twenty," "thirty," &c. before the written number, and by altering in a corresponding way the figures denoting the amounts. Orders so increased, but in all other respects genuine, were presented and paid at the bank in the ordinary way; and it was found as a fact by the arbitrator, that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared by Laidler for their signature.

It did not appear how the indorsements were obtained in these cases, but it was stated as probable that the amounts were increased after the indorsement of the orders.

(1) See ante, p. 184, n. (1).

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In other cases, however, Laidler forged the indorsements to orders not so altered, and obtained payment of them to the amount of 287*l.* 9*s.* 5*d.*

In other cases, again, he both forged the indorsements and also increased the amounts, and obtained payments to the amount of 273*l.* 12*s.* 4*d.*, being 191*l.* in excess of the amount for which the orders were drawn; being enabled in every case to make the fraudulent increase by a want of caution on the part of the guardians as above described.

The guardians brought an action against Barstow for negligence, and in their particulars claimed 3681*l.* 17*s.* 5*d.*, which included all the orders contained in the particulars in the present action; and that action was compromised by an agreement, by which proceedings were to be stayed "on payment to the plaintiffs of the sum of 2320*l.* 4*s.* 6*d.*, the amount of certain of the orders or cheques enumerated in the particulars of the plaintiffs' demand," to be paid by instalments as therein mentioned, "this sum to be accepted in full discharge of all claims, demands, and liabilities in this action, or otherwise against the defendant as clerk to the board;" the plaintiffs engaging to assist Barstow in any proceedings to recover any money from Laidler, or his estate, or in prosecuting him, on being indemnified by Barstow.

In their particulars in the present action the plaintiffs gave credit to the defendant for 1302*l.*, being the amount of thirty-five orders which had been made payable to Barstow, considering that they were morally, though not legally, barred of their claim against the defendant in respect of these orders by their compromise with Barstow; and they claimed against the defendant the balance of 2379*l.* 9*s.* 5*d.* in respect of orders, some of which had been increased, some indorsed, and some both increased and indorsed by Laidler, as above stated.

The questions for the opinion of the Court were:—(1.) Did the settlement with Barstow prevent the plaintiffs from recovering against the defendant in this action? If not (2.) Were the plaintiffs entitled to recover from the defendant any and which of the sums of 287*l.* 9*s.* 5*d.* (the amount of the unaltered cheques with forged indorsements), 273*l.* 12*s.* 4*d.* (the amount of the orders with the amounts increased and the indorsements forged), or

82*l.* 12*s.* 4*d.* (the original amount of the last-mentioned orders), or 19*l.* (the amount of the increase in the same orders)?

Jan. 20, 21. *Field, Q.C.* (*Gibbons* with him), for the plaintiffs. First, as to the defence to the whole action, the settlement with Barstow is no answer. The duties of Barstow and the defendant were entirely distinct and independent, and there is nothing resembling a joint tort. Therefore the rule laid down in *Brinsmead* v. *Harrison* (1) has no application. Secondly, as to both the sums of 287*l.* 9*s.* 5*d.* and 273*l.* 12*s.* 4*d.*, paid on forged indorsements, the defendant is not within the protection of 16 & 17 Vict. c. 59, s. 19 (2), which is an enactment in favour of bankers only: *Ogden* v. *Benas.* (3) The plaintiffs are persons acting under limited statutory powers, and with a statutory duty to appoint a treasurer. Their relation to the defendant is determined by the Poor Law Orders, which shew it to be rather that of master and servant, or principal and agent, than that of banker and customer. The intention of the Orders seems to be that the guardians shall not have a banking account themselves, but that some one person, to be named and appointed by them, shall be personally answerable to them for all moneys received by them or on their account. And, in fact, the plaintiffs had no banking account; they had no pass-book, but their accounts were kept in the treasurer's book as provided by the Orders. (4) The only banking account was the defendant's, and the plaintiffs' orders were not on the bank to pay, but on the defendant at the bank to pay; he might have kept his account at any bank. The mode in which the bank kept the account in their own ledger cannot affect the plaintiffs. Thirdly, assuming that the defendant is protected by 16 & 17 Vict. c. 59, s. 19, yet as to the sum of 19*l.*, the amount by which some of the orders paid on

(1) Law Rep. 7 C. P. 547.

(2) 16 & 17 Vict. c. 59, s. 19: "Any draft or order drawn upon a banker for a sum of money payable to order or demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove that such indorsement, or any subsequent indorsement, was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorsee thereof."

(3) Law Rep. 9 C. P. 513.

(4) See ante, p. 184, n. (1).

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forged indorsements were increased, the defendant cannot discharge himself. He can only discharge himself by shewing that he has paid moneys by the authority of the plaintiffs. This is clearly laid down in *Scholey* v. *Ramsbottom* (1) and *Hall* v. *Fuller*. (2) The defendant relies upon *Young* v. *Grote* (3), but the grounds of decision in that case are uncertain, and the present case is not within it. Parke, B., in *Robarts* v. *Tucker* (4), puts it on the ground of the plaintiff having, "by signing a blank cheque, given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted." Blackburn, J., in *Swan* v. *North British Australasian Co.* (5), puts it on the ground that "a person putting in circulation a bill of exchange, does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it;" and in the same case (6) Cockburn, C.J., treats it as founded on the principle of avoiding circuity of action. In *Evans' Trustees* v. *Bank of Ireland* (7) Parke, B., in delivering the opinions of the judges, and Lord Cranworth, put it on the ground of estoppel. In a manuscript note appended to the latter case (8) Pollock, C.B., says: "Whatever doubt may seem to be thrown upon the case of *Young* v. *Grote* (3) and *Coles* v. *Bank of England* (9), as to the result in each case, no doubt whatever is thrown upon the principles on which those cases were avowedly decided. This case is an authority for the correctness of those principles, though it professes to doubt the propriety of their application." But, in fact, the difficulty is to know what principle is affirmed by *Young* v. *Grote*. (3) The most probable ground is estoppel by negligence; but *Evans' Trustees* v. *Bank of Ireland* (7) and *Swan* v. *North British Australasian Co.* (5) are authorities that such an estoppel can only arise from some act inducing or inviting fraud; mere want of caution is not enough, for no man is called on to anticipate the commission

(1) 2 Camp. 485.
(2) 5 B. & C. 750.
(3) 4 Bing. 253.
(4) 16 Q. B. 560, at p. 580; 20 L. J. (Q.B.) 270.
(5) 2 H. & C. 175, at p. 183; 32 L. J. (Ex.) 273.
(6) 2 H. & C. at p. 190; 32 L. J. (Ex.) 273.
(7) 5 H. L. C. 389, at pp. 410, 413.
(8) In the Exchequer copy of 5 H. L. C. at p. 415.
(9) 10 A. & E. 437.

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of a fraudulent act so as to be bound by not excluding its possibility. No such act of negligence is established against the plaintiffs here; it is only found that the defendant was misled by their "want of caution," and that finding must be interpreted, and its effect determined, by the facts of the case.

Wills, Q.C. (*Mellor* with him), for the defendant. First, as to the increased amounts, the case of *Young* v. *Grote* (1) has never been overruled, although the precise principle on which it was decided has been made matter of question. No doubt is thrown upon it in *Evans' Trustees* v. *Bank of Ireland* (2), and its authority is expressly recognised in *Ex parte Swan* (3) and in *Orr* v. *Union Bank of Scotland* (4), where Lord Cranworth says: "The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." To use the language of Lord Cranworth in the same case, the question is, whether the payment is not a payment which the defendant is "entitled to consider as valid between him and the plaintiffs;" and that depends on whether the bank clerks were not induced to pay this money through the plaintiffs' negligence. On this point the case is express, that the payment was due solely to the clerks being misled by the plaintiffs' want of proper caution, which excludes any negligence on their own part, or on the part of the defendant. All the conditions, therefore, required by Blackburn, J., in *Swan* v. *North British Australasian Co.* (5) are present; the negligence was in the transaction, it was neglect of a duty owing to the defendant, and it was the direct and proximate, and the sole cause of the excessive payment. If, then, the negligence of the plaintiffs has induced the bank to part with money on their account, apparently with their authority, and upon an instrument in which the genuine part was in the same hand with, and undistinguishable from, the fraudulent addition, then, to avoid circuity of action, as was put by Cockburn, C.J., in the last-mentioned case, they cannot recover from the defendant a sum which on these grounds they

(1) 4 Bing. 253.
(2) 5 H. L. C. 389.
(3) 7 C. B. (N.S.) 400, at p. 445; 30 L. J. (C.P.) 113.
(4) 1 Macq. 513, at p. 522.
(5) 2 H. & C. at p. 182; 32 L. J. (Ex.) 273.

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would be liable to repay. Secondly, as to the forged indorsements, the defendant is protected by 16 & 17 Vict. c. 59, s. 19, which was meant to include all persons acting as bankers. This appears from the earlier Act of 55 Geo. 3, c. 184, the schedule to which exempted from duty "all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker." That Act was repealed by 16 & 17 Vict. c. 59, and the exemption in the schedule is of "all drafts or orders for the payment of money to the bearer on demand, drawn upon any banker or bankers, now by law exempt from stamp duty." The exemption is meant to be as wide as that under 55 Geo. 3, c. 184, although the words "or any person or persons acting as a banker" are omitted; and that this is so is confirmed by the subsequent Act of 17 & 18 Vict. c. 53, s. 7, which, in reciting the exemption, restores the omitted words. It may be concluded, therefore, that the intention was equally extensive in s. 19, and the words are sufficiently general to allow of a construction which will give that intention effect. Further, this account was in effect the plaintiffs' account with the bank, kept at the bank by their direction and on which they, and not the defendant, received in trust. They cannot therefore claim against the defendant what he could not claim against the bank. Thirdly, assuming the defendant to be otherwise liable, the settlement with Barstow is an answer. Without Barstow's negligence the act complained of, that is the unauthorized payment, would not have been done. It is a joint act of negligence, and the principle of *Brinsmead* v. *Harrison* (1) applies.

Gibbons, in reply, referred to *Reg.* v. *Braintree Union* (2) and *Pott* v. *Clegg*. (3)

Cur. adv. vult.

May 8. The judgment of the Court (Cleasby, Pollock (4), and Amphlett, BB.) was delivered by

CLEASBY, B. In this case, which was argued before my Brothers

(1) Law Rep. 7 C. P. 547.
(2) 1 Q. B. 130.
(3) 16 M. & W. 321.
(4) Pollock, B., doubted as to the second item, but as the question depended on inference from facts, did not dissent.

Pollock and Amphlett and myself, the question is whether the defendant, who was the treasurer of the plaintiffs, is liable to them for moneys received and not accounted for. The facts appear upon the special case, and it is unnecessary to recapitulate them.

The question arises upon two items; that is, as was agreed by the learned counsel, it is reduced to two items. The two items are: First, 273*l.* 12*s.* 4*d.* (composed of two amounts, 191*l.* and 82*l.* 12*s.* 4*d.*); second, 287*l.* 9*s.* 5*d.*

The question upon the first item is, whether the defendant can claim the credit of payments made by him upon orders which had been signed by the plaintiffs, but had become forgeries by the amounts being increased. Under ordinary circumstances he could not claim the benefit of those payments; but it was said the forgeries were attributable to the negligent and improper manner in which the drafts were drawn. The alleged negligence was by leaving blanks in the drafts which admitted of the insertion of increased amounts by the person who wrote them, and who committed the forgeries. Since they were signed by or on behalf of the plaintiffs in the improper form in which they had been drawn, the case is the same as if they had been drawn in their improper form, and the plaintiffs cannot, we think, avail themselves of the fact that the drafts were not drawn by themselves, but by some person in the office of their clerk.

We have upon the consequences of the negligent drawing of the plaintiffs the following statement: "The orders thus fraudulently increased in amount, but genuine in all other respects, were presented and paid at the bank in the ordinary way, and I find that the payment by the treasurer's clerks of the excess in these instances was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk, in signing the orders fraudulently prepared by Laidler for their signature." The question, therefore, which arises upon this item is, whether the negligent drawing of the drafts disentitles them to complain of the cashing those drafts. Upon this question we had before us the principal case of *Young* v. *Grote* (1), followed by several other cases, among others *Robarts* v. *Tucker* (2), and *Swan*

(1) 4 Bing. 253.

(2) 16 Q. B. 560; 20 L. J. (Q.B.) 270.

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v. *North British Australasian Co.* (1) We think the position taken by the defendant is made good by those authorities. It is true that there is some difference of opinion as to the proper legal ground for the conclusion, and perhaps some difficulty in determining which is the soundest. It is put on the ground of the negligence itself disentitling the party guilty of it in the first cited case, where the fault is said to be all on one side, and where the conclusion is justified in the judgment of Best, C.J., by an apposite quotation from Pothier. In the case of *Robarts* v. *Tucker* (2), upon error from the Queen's Bench, Baron Parke, in no way impeaching the judgment in *Young* v. *Grote*, considered that it was founded on this, that the person who negligently drew the cheque "as it were gave authority to the party to fill up the cheque in the way it was filled up."

In the last cited case (*Swan* v. *North British Australasian Co.* (1)) the present Lord Chief Justice of the Queen's Bench preferred putting the conclusion upon the ground of avoiding circuity of action, which is certainly the most exact ground, and agrees with what is said by Pothier in the passage referred to. But these various reasons for the conclusion only show how incontestable the conclusion itself is; and it is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular county, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default, against a person who was misled by that default without any fault of his own. So far, therefore, as regards this item of 273*l.* 12*s.* 4*d.*, we think the plaintiffs cannot recover.

As to the other item of 287*l.* 9*s.* 5*d.*, the question raised is one of some difficulty, and we thought proper to take time to consider of it. This item may be taken to be the amount of orders which were paid upon forged indorsements, and the negligent drawing of orders does not apply to it at all.

The question raised is, whether, under the circumstances of the

(1) 2 H. & C. 175; 32 L. J. (Ex.) 273. 10 Jur. (N.S.) 102

(2) 16 Q. B. 560; 20 L. J. (Q.B.) 270.

case, the defendant can claim the protection given to bankers by the statute 16 & 17 Vict. c. 59, s. 19. Previous to that statute, if a banker paid a cheque with a forged indorsement upon it he could not charge it against his customer; but the effect of that statute was to enable him to do so.

Two arguments were addressed to us upon this part of the case. First, it was said that, taking that statute together with several other statutes on the same subject, the word "bankers" was not to be restricted to persons regularly engaged in the business of banking, but that any person who receives the money of another into his charge, and, according to the course of business between them, pays it out by having drafts drawn upon him payable to order, ought to be considered a banker within that enactment. We cannot accede to that argument. We think the legislature had reference to a particular class, viz., persons carrying on the business of bankers, and conferred upon them a great privilege. Such a privilege can only be claimed by the clearest language. A confidence might be well placed in the integrity and character of some persons, which would not belong to *any* person entrusted with money.

The other ground taken deserves more consideration. It was contended that all the facts of the case taken together shewed that the account of the guardians ought to be regarded as a banker's account kept by them with the Halifax Bank. The manner in which the orders were drawn, not being drawn upon the bank, but the treasurer, who was manager of the bank, was relied upon, and no doubt with some reason, to shew that there was not a banking account between the guardians and the bank. And if there was no other evidence on this part of the case, it would be conclusive.

But it appears that the course of business was for money to be paid to the credit of the plaintiffs across the counter. It further appears that for some time the plaintiffs' account was kept in a pass-book in the usual manner, and that afterwards it was kept in a treasurer's book in the prescribed form. It seems clear that, until the change, the bankers were the bankers of the plaintiffs; and, though the statement is not so full as it might have been, the change was not for the purpose of altering the relation between

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the plaintiffs and the bank, but to comply with the rules as regards the treasurer. And this conclusion is fully warranted by the statement, from which it appears that unquestionably in point of fact the guardians had for their own benefit an account of some sort with the bank, and the money was by consent of both parties regarded as theirs, and the plaintiffs received considerable sums of money from the bank as interest for their money. It was, therefore, a banker's account.

But it was forcibly argued that, according to the poor-law regulations, this could not be. The guardians are to pay to the treasurer, and the treasurer ought to have had his own account with the bankers. The answer to this seems to be that the guardians chose to make use of a manager as treasurer, and in that way have the benefit of an account with the bank. We must, upon the question before us, deal with the facts as they are, not as they ought to have been.

It follows that the plaintiffs having chosen to keep and have the benefit of a banker's account, must take it with its incidents, and one of those is, that the payment of a genuine cheque with a forged indorsement is a discharge.

It may be said that, though the bankers are discharged as against the plaintiffs, still the treasurer is not discharged, because he has bound himself to account for what he receives. But the proper answer to this seems to be, that there was, in consequence of the manner in which the plaintiffs, who were the masters, chose to have the account kept, no receipt except by the bankers, and the defendant could not help himself; he can only, therefore, be regarded as receiving subject to the consequences of the manner of receiving.

It may also further be said, that if the account must be regarded as the account of the treasurer with the bank, still it was an account kept by him with this bank by the order of the plaintiffs, and they ought not, therefore, to make a claim which he could not have enforced against the bank.

The case is one of difficulty, in consequence of the parties having departed from the proper course; but we think the proper conclusion is, that as the only receipt by the defendant was the receipt by the bankers, under the circumstances stated in the

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case, he cannot properly be held liable when they, without any act or default on his part, are discharged.

Judgment for the defendant.

Attorneys for plaintiffs: *Le Riche & Son.*

Attorneys for defendant: *Jacobs, North, & Vincent.*

[IN THE EXCHEQUER CHAMBER.]

May 15.

TYERS AND OTHERS *v.* THE ROSEDALE AND FERRYHILL IRON COMPANY, LIMITED.

Contract of Sale of Goods—Delivery by Instalments—Monthly Deliveries—Forbearance of Vendor at Request of Vendee.

10 C.B. 600, 606, 10 C.B.D. 22

The defendants in October, 1870, contracted to sell to the plaintiffs 2000 tons of iron "delivery in monthly quantities [of 166⅔ tons] over 1871, or sooner if required;" payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2000 tons. The defendants refused it, and denied that they were liable to deliver any more iron under the contract, except what was due on the monthly balance. The plaintiffs then brought an action for non-delivery.

The majority of the Court of Exchequer (Kelly, C.B., and Pigott, B.) held that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2000 tons in December, and were therefore not entitled to recover; but Martin, B., dissenting, held that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2000 tons under their contract:—

Held, by the Exchequer Chamber, reversing the judgment of the Court below, that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the 2000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action.

APPEAL from the decision of the Court of Exchequer, making absolute a rule to enter a verdict for the defendants: Law Rep. 8 Ex. 305.

The pleadings and the material part of the case are set out

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in the report in the Court below. It is unnecessary to give the correspondence, as the facts can be gathered from the head-note, but it may be here mentioned, that when the defendants wrote refusing to deliver the balance of the iron in December, the plaintiffs wrote insisting upon the delivery of the balance of the 2000 tons, and the defendants replied denying that they were liable to deliver any more than what was due on the monthly balance, and that in the action the defendants paid into Court sufficient to cover the deficiency due on the monthly balance. Blackburn, J., who tried the case without a jury, ruled that the effect of the different postponements, at the request of the plaintiffs, by the consent of the defendants, was not to put an end to the contract, but only to postpone the time for the delivery, and consequently there was a breach of contract. He reserved leave to the defendants to move to enter a verdict on the construction of the documents and correspondence. As to the damages, he further ruled that the breach was on the day in December when the defendants definitively refused delivery, and that the damages were to be estimated at that date, the defendants to have leave to move that the damages be estimated at any other period or upon any other principle the Court might lay down, and to reduce the damages or enter the verdict accordingly. A verdict was entered for the plaintiffs in pursuance of this ruling, and a rule nisi was afterwards granted to enter a verdict for the defendants or to reduce the damages on the ground that the quantities undelivered were so undelivered at the request of the plaintiffs, and that the plaintiffs were not ready and willing to take them when they ought to have been, and that the plaintiffs were not entitled to sue in respect of them, that the original contract was abandoned or varied, that no new contract to the effect alleged by the plaintiffs resulted from the evidence, that the damages ought to be calculated at the monthly prices of each month's deficiencies, and that the money paid into Court was enough, and that the postponement (if any) was not to the month of December, and that the breaches should have been taken each month to the 1st of December.

Against this rule, which was made absolute by the Court of Exchequer (Martin, B., dissenting), the plaintiffs appealed.

Cave, for the plaintiffs. First, the question whether the parties

did or did not enter into a new contract was one of fact for the judge at the trial.

[*Herschell, Q.C.*, for the defendants, intimated that he should not contend that there was no writing to satisfy the Statute of Frauds.]

The substantial question is, can anything be found in the correspondence to exonerate the defendants from their liability to deliver the whole 2000 tons of iron? It will be observed that they did not ask for a reasonable time to enable them to deliver the balance, but insisted that they were only liable for the December delivery. There are no cases which throw much light upon the effect of the correspondence. *Ogle* v. *Vane* (1), which was referred to in the Court below, has very little bearing upon the subject. Secondly, with regard to the damages, it is not likely to be disputed that, as there was a rising market, it was a positive advantage to the defendants to have them assessed as though the breach were in December.

Herschell, Q.C. (*Waddy, Q.C.*, with him), for the defendants. No objection is now taken to the period with respect to which the damages were assessed. But as to the defendants' liability to deliver the 2000 tons, it is contended that the judgment of the Court below was right. The plaintiffs are bound to shew that they were ready and willing to receive the iron when it ought to have been delivered.

[BLACKBURN, J. The answer is, "We were ready to receive the iron when you were ready to deliver it, but we requested you not to require us to receive it, and you consented."]

The liability of the plaintiffs to receive must stand or fall wit the liability of the defendants to deliver. The parties intended that upon each occasion when an instalment was not received the defendants should not be bound henceforward to deliver it. It is most unreasonable to suppose that it was meant that the whole balance of the iron should be called for at the end of the year. [He cited *Brown* v. *Muller*. (2)]

Cave was not heard in reply.

COCKBURN, C.J. I am of opinion that the judgment of the Court of Exchequer must be reversed. I think that the true view

(1) Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272.
(2) Law Rep. 7 Ex. 319.

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of the case was taken by the dissenting judge, Baron Martin. There was a contract to purchase 2000 tons of iron to be delivered in monthly instalments. It did not suit the purchasers to take the iron in the instalments originally contemplated by the parties, and they proposed to the sellers to postpone from time to time the delivery of the monthly instalments. Now it would have been perfectly competent to the defendants to say, "We will not acquiesce in that proposal of yours. You are bound to take the iron month by month, and you must so take it, or consider the contract at an end." Instead of doing that the defendants, as I read the letters, acquiesced, not in holding the contract at an end, but in postponing the period of delivery. The iron was to be delivered in the course of the year 1871, and there was, by reason of this postponement, a very considerable arrear at the end of this year. Then the plaintiffs call on the defendants to deliver at once the whole of what remained undelivered. I think that this was a demand which they were not entitled to make. I think that the postponement had the effect of carrying the period of delivery over the year 1872, but that the defendants could not be called upon to deliver 1000 tons of iron at one time, but only in such quantities as was originally provided for. Therefore the defendants might have said, "We shall not deliver the whole that remains in one mass, but we will deliver it according to the terms of the contract." But they did not say this. What they said was, "We will not deliver you anything at all." There I think they were wrong. Consequently, there was a breach of the contract, for which the defendants are liable in damages.

The question of the damages might have been a matter of nice calculation, as to what was the damage in respect of each monthly instalment of the period which still remained for delivery. But, fortunately, that question does not arise here, for the assessment of damages at the December market-price is advantageous to the defendants, and not to the plaintiffs. I think the true effect of the correspondence is that there was merely a postponement of the period of delivery of the instalments, the contract still remaining open, and both parties being bound by it. I think, therefore, that the judgment of the Court below should be reversed.

BLACKBURN, J. I am of the same opinion. It is hardly neces-

sary for me to say more than that I entirely agree with the judgment of Baron Martin in the Court below, but I wish to draw attention to two points which need not be decided here. The first is this, whether, when the postponement of deliveries took place at the plaintiffs' request, the effect was to make the balance of the iron deliverable during the rest of the year 1871 by monthly instalments, or whether the plaintiffs had a right to require to have it all delivered in December. I do not think it necessary to decide this point, for in December the defendants in effect said, "We will deliver a certain quantity, and no more at any time." Had they said, "We want a reasonable time, and no more," I should have been willing to construe the agreement in that way. But they did not ask for time; they refused to deliver anything but the monthly quantity.

Then comes the other question, what, when there was a complete breach of the contract in December, was the measure of damages? Is it what would enable the plaintiffs to go into the market and purchase the iron at the then market-price, or ought the damages to be computed by the different monthly prices which prevailed afterwards, ascertained as a matter of fact, or ought the calculation to be made before the trial? This, again, is a question upon which I do not wish to express an opinion, as it does not arise here, inasmuch as it appears that the amount ascertained by taking the price in December was more favourable to the defendants than if it had been taken afterwards.

MELLOR and LUSH, JJ., concurred.

BRETT, J. I agree with the judgment of the Lord Chief Justice, but I desire to reserve my opinion as to the measure of damages, and as to whether, for that is really what it comes to, the case of *Roper* v. *Johnson* (1) decides the point.

LINDLEY, J., concurred.

Judgment reversed.

Attorneys for plaintiffs: *Torr & Co., for Middleton & Sons, Leeds.*

Attorney for defendants: *J. Scott, for Hodge & Harle, Newcastle-upon-Tyne.*

(1) Law Rep. 8 C. P. 167.

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April 27.

REES *v.* WILLIAMS.

Attorney and Solicitor—Remuneration in Lieu of Costs—Action for Breach of Agreement—Attorneys and Solicitors Act, 33 & 34 *Vict. c.* 28, *ss.* 4, 7, 8, 9.

The declaration alleged that by an agreement in writing between the plaintiff, who was an attorney, and the defendant, it was agreed (inter alia) that the defendant should be prepared to sell certain gas works, and that the plaintiff should be employed to carry out the sale, and be paid a commission of 4*l.* per cent. on the purchase money in lieu of costs. Breach, that the defendant would not permit the plaintiff to carry out the sale, and had refused to pay any commission. Plea, that the agreement was for services to be done by the plaintiff as the defendant's attorney and solicitor within the meaning of the Attorneys and Solicitors Act, 1870, of which s. 8 enacts that "no action shall be brought upon any such agreement":—

Held, on demurrer, that the plea was bad, and the action maintainable, for s. 8 was intended to prevent actions to recover the remuneration agreed upon in lieu of costs when the work had been done, and did not apply to an action for refusing to allow the attorney to do the work and earn the remuneration.

The declaration alleged that the plaintiff was an attorney and solicitor practising at Cowbridge, in the county of Glamorgan, and the defendant was the owner of a large number of shares in the Briton Ferry Gas Works Company, and was also lessee of the Briton Ferry Gas Works from the company, and the defendant, being unable otherwise to carry on the works, was desirous of obtaining moneys, to be lent to him for the purpose of enabling him to carry on the works, and also to enable him to purchase other shares in the company; and requested the plaintiff to procure moneys to be lent to him as aforesaid, and thereupon on the 2nd of October, 1872, an agreement was made between the plaintiff and the defendant, in the words and figures following:—

"Briton Ferry, 2nd October, 1872. To Mr. Thomas Rees, solicitor, Cowbridge. I hereby agree to pay you a commission of 5*l.* per cent. for all money you will obtain for me to purchase shares in the Briton Ferry Gas Works, in lieu of your costs. Also I hereby agree to be prepared within six months from the 1st March next to sell the said Briton Ferry Gas Works, and for the consideration aforesaid I hereby agree that you shall have the carrying out of the sale, and I agree to pay you a commission of 4*l.* per cent. on the purchase money in lieu of your costs; and if there shall be

any other shareholder who may object to your being paid this commission, I agree to pay you the same out of my own share of the purchase money. As witness my hand this second day of October, 1872. "Evan Williams."

That the plaintiff did at the request of the defendant, as aforesaid, procure moneys to be lent to him, amounting together to 645*l.* for the purposes aforesaid, and the defendant was thereby enabled to carry on the works, and to purchase other shares in the said company. That the defendant did within six months after the 1st of March, to wit, on the 28th of March, 1873, procure an agreement to be made between the Briton Ferry Gas Works Company and the defendant and the local board of the district of Briton Ferry, whereby it was agreed between the parties thereto (subject to the sanction of Parliament, which was afterwards and within the said period of six months obtained) that the company and the defendant should sell to the local board, and the local board should buy of the company and the defendant the Briton Ferry Gas Works and the interest of the defendant as lessee thereof, for the sum of 6661*l.* 10*s.* That all conditions were fulfilled, and times elapsed, &c., and the sanction of Parliament was before the breach hereinafter mentioned duly obtained to the agreement of March, 1873, between the company and the defendant and the local board. Breach, that though more than six months have elapsed since the 1st of March, the defendant did not employ the plaintiff in or about the carrying out of the last-mentioned agreement, or in or about carrying out any sale of the gas works, nor permit the plaintiff to have the carrying out of the last-mentioned agreement, or of any such sale as aforesaid, and has not paid to the plaintiff a commission of 4*l.* per cent. or any commission on the purchase money in lieu of costs or otherwise, but has wholly refused to pay any commission, and the plaintiff claims 266*l.* 9*s.*

Plea, that the agreement in the declaration mentioned was an agreement in writing made by the plaintiff, who then was an attorney and solicitor of Her Majesty's Courts at Westminster, and then was the defendant's attorney and solicitor, and was made with the defendant as his client respecting the amount and manner of payment for future services, fees, charges, and disbursements in respect of business to be done by the plaintiff as such

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attorney and solicitor, and as a conveyancer for the defendant as his client in that behalf, the same not being business to be done in any action at law or suit in equity, nor in any Court, and the amount payable under the agreement exceeding 50*l.*, and that the same was by both parties to it intended to be made in pursuance and subject to the provisions of the Attorneys and Solicitors Act, 1870.

Demurrer to the plea and joinder. The demurrer was argued first on the 26th of January, before Bramwell, B., and Pollock, B., by *Anstie*, for the plaintiff, and *Roland V. Williams* for the defendant. After taking time to consider, the Court desired that the case might be re-argued.

Accordingly, on April 26,

Anstie argued for the plaintiff. Before 1870 such an agreement as that sued on would not have been illegal or void, but the items would have been taxable, and the plaintiff could not have recovered at all unless he had delivered a signed bill under 6 & 7 Vict. c. 73, s. 37, provided the defendant pleaded that defence. *Philby* v. *Hazle* (1) and *Scarth* v. *Rutland.* (2) The object of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28 (3)), was

(1) 8 C. B. (N.S.) 647; 29 L. J. (C.P.) 370.

(2) Law Rep. 1 C. P. 642.

(3) By this Act, entitled "An Act to amend the law relating to the remuneration of Attorneys and Solicitors, it is enacted—

Sect. 4. "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained. Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a Court or a judge to be taken thereon by motion or petition, and such Court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to

to place the attorney in a better, not a worse position. The defendant will say this action is barred by s. 8, "No action or suit shall be brought or instituted upon any such agreement," i. e. such an agreement as is provided for by s. 4. It may be a question whether the agreement sued on is within s. 4 at all; for, obtaining a loan of money and carrying out a sale of gas works do not necessarily require an "attorney or solicitor, or an advocate or conveyancer," and are constantly performed by other persons. If the agreement be not within s. 4, the action is clearly maintainable. But assuming that some portion of the carrying out the sale would bring the agreement within s. 4, then s. 8 must mean that upon

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be cancelled, and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

Sect. 7. "A provision in any such agreement that the attorney or solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such attorney or solicitor, shall be wholly void."

Sect. 8. "No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements in respect of which the agreement is made by the Court in which the business or any part thereof was done, or a judge thereof; or if the business was not done in any Court, then where the amount payable under the agreement exceeds fifty pounds, by any superior Court of law or equity, or a judge thereof; and where such amount does not exceed fifty pounds, by the judge of a county court which would have jurisdiction in an action upon the agreement."

Sect. 9. "Upon any such motion or petition as aforesaid, if it shall appear to the Court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such Court or judge by rule or order, in such manner and subject to such conditions, if any, as to the costs of such motion or petition as such Court or judge may think fit; but if the terms of such agreement shall not be deemed by the Court or judge to be fair and reasonable, the same may be declared void, and the Court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges, and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner and according to the same rules as if such agreement had not been made; and the Court or judge may also make such order as to the costs of and relating to such motion or petition, and the proceedings thereon, as to the said Court or judge may seem fit."

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any such stipulation as is contemplated by s. 4, viz. a stipulation that the attorney shall be paid by a gross sum or commission, &c., no action shall be brought to recover the remuneration. It cannot mean that no action shall be brought upon any agreement which contains such a clause; for, if so, the client could not sue his attorney for negligence in carrying out, or a refusal to carry out, such an agreement. Suppose an agreement that the attorney should find funds to carry on a suit, and the attorney refuses in the middle of the suit. The mischief may be irreparable. Is the client to have no damages, nor any right of action? If so, clients are worse off since the Act than before. It is no answer to this to say that s. 8 enables "the Court or a judge" to "enforce the agreement without suit or action on motion or petition." Assessing damages for the breach of an agreement is not "enforcing it;" and if it were, assessing unliquidated damages on motion or petition is an unheard-of proceeding, and one for which there is no machinery provided in the Act or otherwise. "Enforcing" such an agreement can only relate to the amount of costs; it must mean requiring the client to pay the agreed costs, or such part as the Court may think fair and reasonable under s. 9; and this supposes the work to have been done. This construction makes the whole statute consistent, and s. 8 will mean that no action shall be brought upon that part of an agreement which relates to costs, when the work has been done, but the attorney shall obtain payment by motion or petition to the Court or a judge. In this view the present action is clearly maintainable, for it is not an action to obtain payment for work done, but for damages for not allowing the attorney to carry out the agreement and earn his commission.

Giffard, Q.C. (*Roland V. Williams* with him), for the defendant. Negotiating loans is part of an attorney's business; and carrying out a sale includes the preparation of a conveyance, the special province of an attorney. Moreover, the plea asserts, and the demurrer admits, that the agreement was for "business to be done by the plaintiff as such attorney," &c. The plaintiff cannot, therefore, deny that the agreement falls within s. 4. Then s. 8 is clear and unqualified that no action shall be brought upon any such agreement. "Enforcing" an agreement must be read in the popular sense of giving a remedy for a breach. It is natural that the

legislature should desire to substitute the Court and a master for a jury in assessing the amount; for a jury can give only such an amount as a master would tell them was fair and reasonable. The Court, through its masters, assesses damages every day in arbitrations under the Common Law Procedure Act, 1854; and there is therefore nothing new in that idea. Perhaps s. 8 ought to be read, "no action shall be brought by the attorney upon any such agreement," and this construction will remove the difficulty as to actions for negligence by the client. Sect. 7 shews that "such agreement" must receive a wider construction than the plaintiff gives; but for the present question it is sufficient to say that upon the plaintiff's own construction the action is barred, for though in form for not employing the plaintiff, it is really for the amount of the commission, and a judge must tell a jury to give that amount.

Anstie, in reply. The measure of damages will not be the amount of the commission, for the jury must of course make a deduction for the fact that the plaintiff has not had to spend his time and labour. There is not a word in the Act to shew an intention to distinguish between actions by clients and actions by attorneys. The defendant has a remedy given him by s. 9, to set aside this agreement if it is not "fair and reasonable" in the opinion of the Court, but he has not chosen to exercise this remedy.

Cur. adv. vult.

April 27. KELLY, C.B. The case is certainly one of considerable importance, and at first sight it might appear to raise a question of some difficulty; but when it is seen that the word "agreement" in s. 8 of the Attorneys and Solicitors Act, 1870, means, when applied to the case before us, not the entire contract between the parties, but only the single particular stipulation for the remuneration of the attorney by way of commission, the difficulty is at once solved. The agreement in question was in effect that the defendant would employ the plaintiff to act as his attorney in a certain transaction of considerable importance to both parties, and the allegation is that the defendant refused to employ him, and the plaintiff claims damages by reason of that

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refusal. The agreement contained a stipulation that upon the performance of the duties, and upon the execution of the business to be entrusted to the plaintiff, he should receive as remuneration a commission of 4 per cent. Under the Act of 1870 that was a valid stipulation, but with this qualification, that no action could be brought upon it. Either party to that stipulation may apply, by motion or petition, to the Court, who have power, under ss. 8 and 9 of the Act, to examine and determine every question respecting the validity or effect of the agreement or stipulation, and if they think it fair and reasonable, to enforce it upon terms; or if they consider the stipulation unreasonable, they may declare that the stipulation is void, and the business being done, that the attorney shall be remunerated as if such stipulation had not been made. In truth, upon such a stipulation considered by itself, the Court have power, upon motion or petition, to decide the whole case between the parties according not merely to law, but to justice and good sense. In this view, and confining the operation of the Act of Parliament to the particular stipulation in question, effect might be given not merely to every provision, but literally to every word that is found in any one of the sections of the Act.

On the other hand, the statute is supposed to be this, that upon an agreement being entered into between an attorney and his client, or one who is about to become his client, not only a stipulation of that nature, but every term and engagement to be found throughout what might be a very long and multifarious agreement, should be within the jurisdiction of the Court upon motion, and that no action could be maintained upon it. That construction would be so startling and unreasonable, that, unless we were compelled by the express language of the Act itself, it would be impossible to adopt it without doing great injustice. Take this very case for an example. An attorney is not merely engaged, but has prepared himself, and it may be at considerable expense, to carry out on behalf of a client the sale of a large estate for a considerable sum of money, and he would have been entitled to a large commission if he had been allowed to transact the business. On the other side, the client might have cause to complain that while he was ready to employ the attorney to effect this sale, and conduct the transaction from begin-

ning to end, the attorney had refused to do so, and the consequence might be that he would have lost the sale of an estate for a very large sum of money, and if he were to sell the estate at all, he might be obliged to sell it at a very considerable loss. That is a case which has nothing to do with the law of attorneys in respect of remuneration for business to be done. It is the common case of an action between one man and another, in which it is possible that the complainant may recover very large damages, and which it is impossible to suppose that the legislature (unless they used language which would admit of no other construction) intended to be determined upon motion in Court. To shew this still more strongly let me put this case: suppose there had been a separate and collateral clause that the attorney should receive the son of the client as articled clerk upon payment of 100*l.*, and that clause in the agreement was not carried out, it is impossible to imagine that the legislature intended that the attorney should not be able to maintain an action to recover the 100*l.*, but must call upon the Court to decree payment of the 100*l.* The difficulty of holding that the Court is, upon motion, to enforce the agreement, is insuperable. If that means, as the language of the Act would seem to import, that the Court is to compel the performance of the agreement, it would be conferring upon this Court a jurisdiction which it does not possess,—to decree specific performance of an agreement which might be in any imaginable form. The agreement might contain other stipulations, embracing every description of engagement which it is possible for one man to enter into with another. To suppose all this was intended, and with nothing in the Act to render it necessary, is, I think, to put a construction upon the Act which is unreasonable, and which in many cases would be mischievous in the extreme.

The whole question turns upon the meaning of the word "agreement" in s. 8. That may be dealt with in, I think, an unanswerable and unobjectionable manner, by holding that it applies not to the entire contract between the parties, but only to the particular stipulation for the attorney's remuneration, which evidently it was the object of the legislature to deal with, and in respect of which it was intended to confer a peculiar jurisdiction upon the Court.

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Upon these grounds I think the plaintiff is entitled to judgment.

BRAMWELL, B. I am entirely of the same opinion. I have now heard this case argued twice. At the end of the first argument, owing, I suppose, to the ingenious observations of Mr. Roland Williams, who argued it then, I was not free from doubt, but having had time to consider the question since, and having heard it again argued, I am clear that the plaintiff is entitled to judgment, and have no misgivings.

Just consider what the proposition is for a moment. Here is an agreement which before the statute would beyond question have been a perfectly valid agreement, except as to the clause that the plaintiff should be paid a fixed sum, and an action would have been maintainable upon that agreement by the plaintiff for not employing him, or by the defendant against the plaintiff for negligence if the plaintiff had been employed and had been guilty of negligence; and an action for work and labour done might have been maintained if the work and labour had been done.

Now it is said that in some way the legislature has enacted that such an action shall not be brought in future. It would be very strange if they had, and one cannot see why they should. One would think, if they did anything so remarkable as to say an action should not be brought against an attorney for negligence because of particular stipulations in the agreement, they would take care to express it in very strong language, which certainly they have not done. The only ground upon which such a proposition can be maintained is that the word "agreement" is used in s. 8, and it is provided that no action shall be brought upon "any such agreement." What is meant by "any such agreement?" You will find it mentioned in s. 4, which says that such an agreement shall be valid; that is not the entire agreement, but the particular agreement that something other than taxed costs may be agreed for. If you incorporate those words in s. 8 it means that no action shall be brought upon the agreement to pay the costs agreed for other than taxed costs. Then no action can be brought to enforce that; but that of itself supposes the work is done, and when you come to look at the rest

of s. 8 and s. 9 it is manifest that what the legislature had in view was this, when the work is done and the money is earned the payment shall not be enforced by action, but application shall be made to any superior Court of law or equity or the county court, according to the amount in dispute, in order to ascertain whether the stipulation is a reasonable one, and whether it shall be enforced or not.

Then it was gravely said, "You are enforcing an agreement which has been irreparably broken if you award damages for the breach of it." That is equivalent to saying, "You enforce an agreement to marry by making the man who will not marry pay damages for not having married;" and that seems to me something like nonsense. When one looks, therefore, at the words that have been used, at the insuperable difficulties that are in the way of supposing the Court could try every question arising upon agreements of this description (such questions as my Lord has referred to), it seems impossible to have any doubt. The difficulty has entirely arisen from the unfortunate use of the word "agreement," instead of saying "so much of the agreement," or "that part of the agreement relating to the payment of an agreed sum of money," or some such words.

POLLOCK, B. At the close of the first argument I not only entertained considerable doubt with regard to the construction of this Act, but I confess I was rather inclined to think the language was so marked as to prevent the plaintiff from maintaining the present action. The further argument I have heard, and the reasons that have been adduced by my Lord and my Brother Bramwell have induced me to think decidedly that the action is maintainable. When I look at the whole intention of the Act, which clearly is pointed not to the entirety of an agreement of this kind, but merely to so much of it as relates to the mode in which the attorney shall be remunerated, and also when I look at ss. 8 and 9, which seem to assume that when the Court interferes it shall be in respect of matters arising out of what has been done under the agreement, and not in respect of matters that may arise out of a breach of the agreement, and when I further see that if the construction contended for by the defendant were the correct

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one it would lead this Court to a new mode of procedure and practice hitherto unknown to it, all of which must be supposed to have been in the contemplation of the legislature when this Act was passed—I come to the conclusion that s. 8 was intended to apply merely to that portion of any agreement between an attorney and his client whereby the mode of remuneration was to be governed.

I think, therefore, that the plaintiff is entitled to maintain his action.

AMPHLETT, B., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Vizard & Co.*

Attorneys for defendant: *Gover & Norton, for Gover, Swansea.*

May 7.

DALBIAC AND OTHERS *v.* DELACOURT AND ANOTHER.

Practice—Ejectment—Costs on Judgment for Plaintiff by Consent.

When the real defendant in an action of ejectment appears and consents that the plaintiff shall sign judgment, the plaintiff is entitled to costs, though the case is not specifically provided for by the Common Law Procedure Act, 1852.

EJECTMENT. The writ, issued on the 30th of June, 1874, was directed to Greenfield and others, the tenants in possession, who did not appear. The defendants Delacourt and another appeared separately to defend as landlords for certain specified portions of the premises, and the plaintiffs signed judgment for non-appearance in respect of the remainder. On the 23rd of July a judge's order was made by consent "that the plaintiffs be at liberty to sign judgment against Alfred Laureston Delacourt and John Scoltock, as landlords, in respect of the premises Nos. 65, 67, and 69, Chatham Street, with stay of execution for six weeks from this date."

In February, 1875, the plaintiffs took out a summons for taxation of their costs, but the Master, being of opinion that they were not entitled, dismissed the summons, and the question was afterwards referred by Mellor, J., at Chambers to the Court. A

rule having been obtained calling on the defendants Delacourt and Scoltock to shew cause why they should not pay to the plaintiffs their costs of suit under the judgment signed therein, or why the order of the 23rd of July should not be amended, by adding a provision that the defendants should pay to the plaintiffs their costs of suit;

Beasley shewed cause. The plaintiff can only be entitled to costs if they are given him by the Common Law Procedure Act, 1852, and that Act gives the claimant costs only upon "a finding for the claimant" under s. 185, or where the defendant "confesses the action" with the prescribed formalities under s. 203. The present case does not come within either section. Before the Act a defendant could not appear except on the terms of signing a consent rule which provided for costs. If no person appeared, and judgment was entered against the casual ejector, the plaintiff had no other remedy for his costs than by action of trespass for mesne profits: Chit. Pr. 8th ed. (1847), p. 954; *Doe* d. *Rees* v. *Howell*. (1) The law is the same now as to judgment for default of appearance under s. 177 of the Act: Day's Common Law Procedure Act, 4th ed. p. 186. The Statute of Gloucester, which enacted that "the plaintiff in all actions in which he recovers damages shall also recover against the defendant his costs of suit," does not apply to actions of ejectment, for the plaintiff does not recover damages.

[BRAMWELL, B. (after referring to Tidd's Practice and Tidd's Forms). Before the Common Law Procedure Act, 1852, the declaration in ejectment claimed damages, and the plaintiff who recovered a verdict against the real defendant recovered damages, though he usually remitted them.]

Bompas, for the plaintiffs, in support of the rule. The passage cited from Chit. Pr. only applies to actions where there was no appearance. Before the Common Law Procedure Act, 1852, costs were recoverable against the real defendant in ejectment after appearance, as in other actions. The Common Law Procedure Act, 1852, s. 207, says in the broadest terms, "The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment heretofore used." Therefore, since costs would have followed under the old law upon

(1) 12 Ad. & E. 696.

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a judgment for the plaintiff by consent against the real defendant, they follow now.

BRAMWELL, B. The rule must be absolute. The validity of the order is not in dispute. The general notion entertained has been that costs follow upon a judgment for the plaintiff in ejectment. If we were to discover that costs did not follow in the old action before the Common Law Procedure Act, there might be some difficulty in seeing how they could follow since the Act, but it is manifest from the books that where the judgment was against the real defendant costs followed; the judgment was in form for damages and costs, though a "remittitur damna" was usually entered. (1) Is there any reason for supposing that the Common Law Procedure Act has made any alteration? None but the argument that the Act has enumerated many cases in which it expressly awards costs, and the present case is not among the number. But that enumeration does not profess to be an exhaustive one; particular cases are provided for, but mention of these does not exclude the case of an ordinary judgment for the plaintiff lawfully obtained.

It was argued that since by the present form of judgment no damages are recovered, the Statute of Gloucester does not apply to actions of ejectment. But that is not so; the alteration of the form of judgment ought not to take the action out of the operation of the statute. I think, therefore, that the plaintiff is entitled to costs.

Then it was said that the order being the subject of a bargain, it must be taken to have contained the whole of the terms, and that if it had been intended that the plaintiff should have costs, it should have been so stated in the order. But I think we must read the order as a bargain that the plaintiff shall have judgment with its ordinary incidents. If nothing had been said about execution, could it have been said that this was an agreement for judgment only, and that no execution could follow? Certainly not. Therefore if the defendants agreed for judgment against them, they must be taken to have agreed for costs.

(1) 3 Bl. Com. Bk. 3, Ch. 11, pp. 199, 205; and App. No. 2, 17th ed.; 2 Chit. Pr. Ch. 25, p. 1319, 8th ed.

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CLEASBY, B. I am of the same opinion. We have to construe the order, and the question is what the bargain was. The concluding clause, which provides for stay of execution, is an argument for the plaintiff's view, on the principle of "expressio unius exclusio est alterius," and shews that except in that particular the plaintiffs were intended to be placed in the same position as they would in other cases where they are at liberty to sign judgment. Here the defendants appeared as landlords, and in every case in which the real defendant appeared in ejectment, judgment for the plaintiff carried costs. In the ordinary form of signing judgment, the judgment is for *l.* costs.

Rule absolute.

Attorney for plaintiffs: *Parkers.*
Attorneys for defendants: *Lewis & Sons.*

CASTRO *v.* MURRAY.

May 8.

Practice—Petty Bag Office—Sealing Writ of Error in Misdemeanor—12 & 13 *Vict. c.* 109, *s.* 38—*Fiat of Attorney General—Staying frivolous and vexatious Action.*

It is the duty of the clerk of the petty bag office in the Court of Chancery not to seal a writ of error in cases of misdemeanor until the Attorney General has issued his fiat.

The plaintiff having been convicted of a misdemeanor, prepared a writ of error, and requested the clerk of the petty bag office to seal it in pursuance of 12 & 13 Vict. c. 109, s. 38. The clerk having refused, on the ground that the Attorney General had not issued his fiat, the plaintiff brought an action against the clerk claiming damages for the refusal, and a mandamus to compel the clerk to seal the writ:—

Held, that the action must be stayed, as being frivolous and vexatious, and an abuse of the process of the Court.

THE defendant is the clerk of the petty bag office in the Court of Chancery. The declaration, delivered the 17th of March, 1875, alleged that an indictment against the Plaintiff, called Thomas Castro, otherwise Arthur Orton, otherwise Sir Roger Charles Doughty Tichborne, Baronet, of which the first count charged perjury in Middlesex, and the second charged perjury in the city of London, was found at the Central Criminal Court, and removed by

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certiorari into the Court of Queen's Bench, and there tried at bar by a jury of the county of Middlesex, the trial beginning the 23rd of April, 1873, and ending the 28th of February, 1874, in the vacation, on which last day the plaintiff was found guilty by the jury, and sentenced by the Court to a term of seven years penal servitude on each count, the second term to commence at the end of the first: and was now undergoing the sentence: that the plaintiff feeling aggrieved, and believing that there were many manifest errors in the record and process, and that if he could by writ of error cause a transcript of the record and proceedings of the indictment to be sent to the Court of Exchequer Chamber to be reviewed and examined, the trial, verdict, and judgment would be set aside and reversed for the said errors; and that a writ of error was the necessary, lawful, and regular process for procuring such review and examination, duly prepared a writ of error for that purpose, and requested the defendant, as the clerk of the petty bag, to seal it; that it was the duty of the defendant as such clerk, upon the plaintiff tendering the writ and requesting him to seal it, and complying with all the rules then in force for regulating the practice of the common law side of the Court of Chancery, and upon paying or tendering all lawful fees, to duly seal the writ; that the plaintiff had complied with all the rules, and tendered all the lawful fees, and all conditions had been fulfilled, &c. Nevertheless the defendant wrongfully refused to perform his duty and to seal the writ, whereby the plaintiff had been prevented from having the said record and proceedings reviewed and examined in the Court of Exchequer Chamber, and obliged to continue to undergo the sentences of penal servitude, and would be obliged to endure the same to the end of the terms, and had been and would be prevented from recovering possession by law of divers estates of the value of 400,000*l.*, to which he claimed to be entitled, and was otherwise injured, and the plaintiff claimed 500,000*l.*

The second count claimed a writ of mandamus, commanding the defendant to seal the writ of error.

The defendant did not plead, but on his application Huddleston, J., made an order at Chambers, on the 8th of April, staying all further proceedings in the action on the ground that it was frivolous and vexatious, and an abuse of the process of the Court.

This order was made upon an affidavit of the defendant, which stated that the plaintiff was tried, convicted, and sentenced as alleged in the declaration; that on the 12th of February, 1875, a writ of error in the said case of *Reg.* v. *Castro* was tendered to him to be sealed on behalf of the plaintiff, but the Attorney General not having issued his fiat the defendant refused on that ground, and not otherwise. The affidavit proceeded: "It would be contrary to my duty as such clerk, and contrary to the established regulations and practice of the petty bag office, to seal any writ of error in any criminal case without the fiat of the Attorney General. The rule on this point is precise and inflexible, and I had no option but to decline to seal the writ without the production of the Attorney General's said fiat. Had I done otherwise, I should have been disobeying the regulations of the said office. I am informed and believe that before the application to myself the plaintiff's attorneys, on behalf of the plaintiff, applied to the Attorney General to issue his fiat for a writ of error, but that the Attorney General, having considered the matter, refused to issue the fiat."

Philbrick, Q.C. (*O'Brien* with him) now moved for a rule to rescind the order of Huddleston, J. It is admitted that in felonies a writ of error for the reversal of a judgment is a writ of grace not of right; but in misdemeanors it is contended that it is ex debito justitiæ. In the *Aylesbury Case* (1) it is recorded that Paty and others, burgesses of Aylesbury, having brought actions against the constables for hindering them from voting, were committed to Newgate by the House of Commons, and having sued out writs of habeas corpus, were remanded to Newgate by three of the judges of the Queen's Bench, Holt, C.J., dissenting. Paty and another then petitioned the Queen for a writ of error in order to bring this judgment before the Queen in Parliament. The Queen having referred it to all the judges, whether she ought to grant the writ "ex debito vel merito justitæ," or "ex gratiâ;" all but two were ultimately of opinion, "that a writ of error in this case ought to be granted of right and not of grace," without giving any opinion whether a writ of error lay in that case, that being a question

(1) 14 How. St. Tr. 862.

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proper to be determined in Parliament: see *Burdett* v. *Abbott*. (1) In the *Aylesbury Case* (2) the representation and address of the House of Lords to the Queen in 1704, refers to the resolution of the House of Commons passed in 1689, in *Sir Thomas Armstrong's Case* (3), and says: "We are sure the House of Commons in the year 1689 was of opinion that a writ of error, even in cases of felony and treason, is the right of the subject, and ought to be granted at his desire, and is not an act of grace and favour which may be denied or granted at pleasure; so that as far as the opinion of the House of Commons ought to have weight in such a question (whatever the present opinion of that House is) they then thought a writ of error was the right of the subject in capital cases (where only it had been at any time doubted of). But that it is a writ of right in all other cases has been affirmed in the law books, is verified by the constant practice, and is the opinion of all your present judges, except Mr. Baron Price and Mr. Baron Smith." (4) This address is said to have been drawn up by a committee presided over by Lord Somers. In *Rex* v. *Wilkes* (5) Lord Mansfield, referring to the *Aylesbury Case* (2), says: "In the 3rd of Queen Anne ten of the judges were of opinion 'that in all cases under treason and felony a writ of error was not merely of grace, but ought to be granted.' Price and Smith were of a contrary opinion, 'that a writ of error was of grace only in all criminal cases.' The ten did not mean 'that it was a writ of course,' but that 'where there was probable error, it ought not to be denied.' It cannot issue now without a fiat from the Attorney General, who always examines whether it be sought merely for delay or upon a probable error. . . . . This opinion, in the 3rd of Queen Anne, has made a great alteration as to outlawries in criminal cases under treason and felony. In a misdemeanor, if there be probable cause, it ought not to be denied; this Court would order the Attorney General to grant his fiat." This latter dictum, however, of Lord Mansfield was expressly overruled in *Ex parte Newton* (6), where the Queen's Bench refused an application for a rule nisi to order the Attorney General to issue his fiat for a writ

(1) 14 East, 92, note (b.)
(2) 14 How. St. Tr. 862.
(3) 10 How. St. Tr. 117.
(4) 14 How. St. Tr. at p. 870, and see p. 874.
(5) 4 Burr. at pp. 2550–1.
(6) 4 E. & B. 869, 871; 24 L. J. (Q.B.) 246.

of error in a case where Newton had been convicted of a misdemeanour. The Court held that a probable cause being shewn, the Attorney General, ex debito justitiæ, ought to grant his fiat, and that if he refused to hear and consider the application for a fiat the Court would compel him to do so by mandamus; but that when he had heard, and considered, and refused, the Court could not review his decision or interfere. In *Reg.* v. *Lees* (1) the Court of Queen's Bench confirmed their former opinion, and held that it was "a part of the prerogative of the Crown that a writ of error should not issue except with the concurrence of the Crown, testified by the fiat of the Attorney General." The plaintiff has, therefore, no remedy except the present action. In *Rex* v. *Rowe* (2) the Lord Chancellor of Ireland granted an order, directing the cursitor to seal a writ of error to the House of Lords in a misdemeanor. The cursitor had required the warrant of the lord-lieutenant, which it was not the practice to grant without the fiat of the Attorney General, and this the Attorney General had refused, on the ground that it was mere matter of form and unnecessary. The Lord Chancellor seemed to think that the writ of error was of common right. It is not for the defendant to determine whether the fiat of the Attorney General is a condition precedent to the issuing of the writ. His duties as clerk of the petty bag are defined by 12 & 13 Vict. c. 109; s. 38 of which enacts that when the fees are paid and the rules complied with (as in this case they have been) the writ shall be duly sealed. For refusal to seal the writ an action will lie, as in the analogous case of *Barry* v. *Arnaud.* (3) The defendant can demur if he desires to discuss that question; and that is the proper mode of discussing it. There is no allegation of malice against the defendant; the action is brought to try a constitutional right of great importance to subjects of the realm.

[BRAMWELL, B. Why do you not apply to the Court of Chancery itself to direct the writ to issue?]

We claim a mandamus in this action. The Court of Chancery on its common law side can quash the writ of error if when error is assigned the grounds appear to be frivolous. It ought not to be

(1) 27 L. J. (Q.B.) 403, 406. (2) 2 Mol. Ir. Ch. Rep. 27.
(3) 10 A. & E. 646.

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assumed beforehand that the grounds will be frivolous. If this rule is refused there will be a denial of justice, for the plaintiff will be summarily prevented from trying a question which ought to be deliberately discussed, and which he cannot try in any other mode. An action to try such a question cannot be said to be frivolous or vexatious.

[The Court (Bramwell and Cleasby, BB.) having consulted Kelly, C.B., and Pollock and Amphlett, BB., delivered judgment.]

BRAMWELL, B. We think there ought to be no rule in this case, and that the order of my Brother Huddleston was perfectly correct. It has been sworn by the defendant, in an affidavit before us, and it is within our own knowledge, that it is his duty not to seal the writ until the fiat of the Attorney General has been procured. That is our judgment.

But it will be said, how do we dispose of the opinions and authorities (so far as they are authorities) cited to the effect that a writ of error in cases of misdemeanor is a writ ex debito justitiæ? The answer is, that they raise a question for the Attorney General to decide, and he must deal with those expressions of opinion if he thinks them binding upon him when they come before him. But we are perfectly satisfied that there is no duty in the defendant to seal the writ till the Attorney General has issued his fiat.

This action, therefore, is pretenceless, and has been properly stopped. I do not say it was malicious—in one sense, it may be said to be vexatious—but it is absolutely groundless, and it is one in which the Court, in the exercise of its discretion, ought to stop the proceedings as being an abuse of the process of the Court.

It is always a strong measure to prevent a plaintiff from going on with his action; and we, therefore, decided not to confirm this order till we had consulted the Lord Chief Baron and my Brothers Pollock and Amphlett, all of whom concur in the opinion which I have delivered.

CLEASBY, B. I am entirely of the same opinion. The only obligation or duty in the defendant is one attaching to him as a ministerial officer, and it does not arise until the fiat of the At-

torney General has issued. This is an action for an injury alleged to be sustained by the plaintiff brought against a ministerial officer for not doing what it is quite plain he was not bound to do till the fiat was issued.

If the defendant had refused to seal the writ after the fiat of the Attorney General had issued, a very different question would have arisen.

Rule refused.

Attorney for plaintiff: *C. Harcourt.*
Attorneys for defendant: *Raven & Hare.*

END OF EASTER TERM, 1875.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXVIII VICTORIA.

1875
June 1.

BELLAMY *v.* HOYLE.

County Court Acts (9 & 10 *Vict. c.* 95), *ss.* 31, 33, 78, 94—(30 & 31 *Vict. c.* 142), *s.* 22—*Warrant of Distress against High Bailiff—Special Appointment by Registrar of Bailiff to execute Process—Power of Courts to execute Process.*

Where the judgment debtor under county court process is himself the high bailiff of the court, a special bailiff may be appointed to levy execution, and the warrant may be directed to him and others, although the Acts, 9 & 10 Vict. c. 95, and 30 & 31 Vict. c. 142, contain no express provision upon the subject.

The plaintiff was high bailiff of a county court, the defendant being one of the registrars of the court. An inquiry having been held under 9 & 10 Vict. c. 95, s. 116, which enables the judge to inquire in a summary way into any charge of extortion against a bailiff, and to make an order for the payment of such damages and costs as he shall think just, orders were made by the judge for the repayment by the plaintiff of fees overcharged by him, with costs to be taxed by the registrar. The costs were taxed by the defendant, without reference to the judge, and in the absence of the plaintiff. The plaintiff was served with orders to pay the overcharge, penalties, and taxed costs, but he objected to pay the costs. Application was then made to the defendant as registrar for warrants of execution against the plaintiff, and he issued warrants directed to "R. and others," and delivered to R. a written authority to act as assistant bailiff in the execution of the process, describing it as issued under 30 & 31 Vict. c. 142, s. 22, which directs that "every bailiff duly appointed by a high bailiff or a registrar may serve or execute any process which by any Act passed or to be passed is directed to be

served or executed by a high bailiff, unless otherwise specially provided against therein." R. having seized the plaintiff's goods under the warrants, the plaintiff sued the defendant in trespass:—

Held, first, that the warrants were not made illegal by what took place with reference to the costs, for s. 116 did not require the judge to settle the amount of the costs, and that at any rate the warrants themselves were based upon orders good on the face of them; secondly, that, though 30 & 31 Vict. c. 142, s. 22, was inapplicable, yet as the Act 9 & 10 Vict. c. 95, s. 78, after providing for rules and forms, concluded that in any case not expressly provided for, the general principles of practice in the superior courts of common law might be applied to proceedings in the county courts, it must be taken that the appointment of R. as special bailiff, was like the appointment of an elisor to execute process in the superior Courts, and it was also justified by the inherent power of all Courts, and the necessity of the case, and that the defendant was entitled to judgment.

ACTION for trespass by the defendant upon the house and premises of the plaintiff, and for the conversion of his goods. The following case was stated for the opinion of the Court:

1. The plaintiff was at the time of the alleged trespass high bailiff of the county court of Rotherham, and the defendant was and is one of the registrars of the court.

2. In February, 1873, certain complaints were made against the plaintiff of having taken fees under executions levied by him in excess of the sums allowed by law, and of having extorted fees where none were due. The judge of the county court directed that notice of these complaints should be given to the plaintiff, and accordingly lists were delivered to him. Of these twenty-nine were framed under 9 & 10 Vict. c. 95, s. 116 (1), which provides

(1) By 9 & 10 Vict. c. 95, s. 31, "for every such court (i.e. county court under the authority of the Act) there shall be one or more high bailiffs whom the judge shall be empowered by order of court to appoint, and in case of inability or misbehaviour to remove by a like order (this power of removing was by 13 & 14 Vict. c. 61, transferred to the Lord Chancellor or the Chancellor of the Duchy of Lancaster); and every such high bailiff shall be empowered, subject to the restrictions hereinafter contained, by any writing under his hand to appoint a sufficient number of able and fit persons, not exceeding such number as shall be from time to time allowed by the judge to be bailiffs, to assist the said high bailiff, and at his pleasure to dismiss all or any of them, and appoint others in their stead, and every bailiff so appointed may also be suspended or dismissed by the judge."

By s. 33 "the said high bailiffs, or one of them, shall attend every sitting of the court for such time as shall be required by the judge, unless when their absence shall be allowed for reasonable cause by the judge, and shall by themselves or by the bailiffs appointed to assist them as aforesaid, serve all the summonses

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that, "If any clerk, bailiff, or officer, of the court, acting under colour or pretence of the process of the said court, shall be charged with extortion or misconduct, or with not duly paying or accounting for any money levied by him under the authority, it shall be lawful for the judge to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties in like manner as the attendance of witnesses in any case may be enforced, and to make

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and orders, and execute all the warrants, precepts, and writs issued out of the court, and the high bailiff and bailiffs shall in the execution of their duties conform to all such general rules as shall be from time to time made for regulating the proceedings of the court as hereinafter provided, and subject thereunto to the order and direction of the judge. . . ."

By s. 78 general rules are to be made for regulating the practice and proceedings of county courts, and forms are to be framed for every proceeding in which it is thought necessary, and the rules so made and the forms so framed shall be observed and used in all the courts holden under this Act, and in any case not expressly provided for therein, or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied at the discretion of the judges to actions and proceedings in their several courts.

By s. 94, "whenever the judge shall have made an order for the payment of money the amount shall be recoverable in case of default or failure of payment thereof forthwith, or at the time or times and in the manner thereby directed, by execution against the goods and chattels of the party against whom such order shall be made, and the clerk of the said court, at the request of the party prosecuting such order, shall issue under the seal of the court a writ of fieri facias as a warrant of execution to the high bailiff of the court, who by such warrant shall be empowered to levy, or cause to be levied, by distress and sale of the goods and chattels of such party, such sums of money as shall be so ordered, wheresoever they may be found within the district of the court, whether within liberties or without, and also the cost of the execution, and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such warrant."

The County Courts Act, 1866 (29 & 30 Vict. c. 14), makes provision for the future abolition of the office of high bailiff and the performance of his duties by the registrar.

By 30 & 31 Vict. c. 142, s. 21, "every registrar who may be invested with the powers and authorities of a high bailiff under the provisions of "the County Courts Act, 1866," shall also be invested with the powers and authorities possessed by the high bailiff to the performance of whose duties he may succeed."

By s. 22, "every bailiff duly appointed by a high bailiff or a registrar may serve or execute any process which by any Act passed or to be passed is directed to be served or executed by a high bailiff, unless otherwise specially provided against therein."

such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied as aforesaid, and for the payment of such damages and costs as he shall think just; and also, if he shall think fit, to impose such fine upon the clerk, bailiff, or officer, not exceeding 10*l.* for each offence, as he shall deem adequate; and in default of any money so ordered to be paid, payment of the same may be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said court."

3. The cases were heard, and the judge gave his decision on the 29th of August, 1873. In seventeen cases sums varying from 10½*d.* to 10*s.* were found to have been overcharged or extorted, and were ordered to be returned to the parties. In other cases fines were inflicted. The gross amount ordered to be returned was 1*l.* 10*s.* 4½*d.*, and the fines in all amounted to 29*l.*

4. The learned judge also ordered the plaintiff to pay all the costs of the inquiry when judgment was given for the complainants, and also in some cases where the plaintiff had been guilty of irregularities, and he also directed that the question of costs should be settled by the registrar, and that all the orders for the payment of money should be made for Monday, the 8th of September then next.

5. On Saturday, the 6th of September, at about 5 p.m., the plaintiff was served with an order in the case of *Jowett* v. *Cooke*, one of the cases, to pay on or before the 8th of September next to the registrars of the court 2*s.* for costs or fees overcharged and received by him from L. Cooke, and 14*l.* 6*s.* 11*d.* for costs, and the further sum of 10*l.* as a penalty for making such overcharge, to the registrars for the use of the Court.

6. The plaintiff was at the same time served with similar orders in the other sixteen cases decided against him. The costs ordered to be paid in the seventeen orders amounted in the aggregate to 243*l.* 12*s.* 7*d.*

7. On Monday, the 8th of September, the amounts ordered by the judge to be returned (1*l.* 10*s.* 4½*d*). and the fines (29*l.*) were tendered to the registrar by the defendant, but he refused to accept the same unless the costs, amounting to 243*l.* 12*s.* 7*d.*, were

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also paid, and he sent a letter suggesting that the plaintiff should make application to the Court to have the costs taxed or revised. To this letter no reply was sent.

8. The several bills of costs furnished by the complainant's attorneys were examined and taxed by the defendant as registrar in the absence of the parties. The amounts of the bills were taxed according to the county court scale of costs allowed in actions of debt or contract exceeding 20*l.* No detailed account of the bills of costs was furnished to the plaintiff until he applied for them in November, 1873, nor had he nor the attorneys for the several complainants any opportunity of attending the taxation or being heard thereon. The several bills of costs as settled by the defendant were not seen by the judge, nor was his assent to, or approval of, the amounts of the bills obtained by the defendant.

9. On the 12th of September the defendant drew up warrants of execution in thirteen of these cases.

The case set out a copy of one of the warrants, which recited the order for payment, the plaintiff's default, and, after proceeding in the usual form, concluded:—

"Given under the seal of the court this 12th day of September, 1873.

"To William Robinson and others, the bailiffs hereof.

"By the Court,
"Edward Newman,
"William Fretwell Hoyle,
"Registrars of the Court.

	£	*s.*	*d.*
"Amount ordered to be refunded . .	0	2	0
"Costs allowed	14	6	11
"Fine	10	0	0
"Remaining due . . .	£24	8	11
"Poundage for issuing the warrant . .	0	16	6
	£25	5	5"

Application was made to the registrar for this warrant at 1.30 p.m. on the 12th of September, 1873.

The following indorsement is upon the warrant:—

"Address. William Bellamy, high bailiff, Rotherham.
"Amount ordered to be refunded.
"This 24th day of September, 1873. Goods sold.
"William Robinson."

10. On the 13th of September the defendant delivered to the Robinson named therein these thirteen warrants and a written authority, of which the following is a copy:—

"Rotherham, September 13th, 1873.
"I hereby appoint William Robinson to act as assistant bailiff in the execution of the process of the court issued against William Bellamy, the high bailiff, by virtue of s. 22 of 30 & 31 Vict. c. 142.
"William F. Hoyle,
"One of the registrars of the said Court."

Previously to making this appointment the defendant, on meeting the judge, explained to him the course he intended to pursue with respect to the appointment, upon which the judge expressed an opinion it might be done.

11. On the 13th of September Robinson, in pursuance of the warrants and authority, entered the plaintiff's house and seized and sold his goods.

12. Save in so far as he was appointed such by the said writing, Robinson was not a bailiff of the court, nor authorized to execute the process thereof, but he had previously been an under-bailiff in the employment of the plaintiff.

13. On the 18th of December the plaintiff gave notice that he should apply to the judge of the county court on the 20th of December, 1873, for an order to review the taxation of the costs by the defendant. On the 20th, the attorneys for the complainants appeared by counsel to resist this application, when the advocate for the plaintiff abandoned it without being heard.

14. On the 24th of April, 1874, the plaintiff applied to the Court to rescind the orders for the payment of costs, and for an order for the repayment of the sums levied under the warrants of execution, one of the grounds of his application being that Robinson was not at the time when he executed the warrants a duly

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appointed bailiff of the Court. After hearing the arguments of the attorney for the plaintiff, the judge refused the application, on the ground that the notice of motion was informal, and that he was asked to set aside the notice from the registrar of the order, and not the order of the court itself.

15. It is contended, on behalf of the defendant, that the appointment of Robinson as bailiff was valid under the circumstances appearing in the above case. It is contended, on behalf of the plaintiff, that this appointment was null and void, inasmuch as the plaintiff was at the time when it was so made the high bailiff of the court, and, consequently, that Robinson having seized the plaintiff's goods by the defendant's directions, the defendant is liable to the plaintiff for the act of Robinson in breaking and entering the plaintiff's house and selling the goods.

16. It is also contended, on behalf of the plaintiff, that as the amounts ordered to be paid by the defendant for costs were not submitted to or approved of by the judge, nor assented to by the parties, the defendant had no authority to sign or issue the orders or warrants, and, consequently, that on this ground also the executions were illegal. The defendant, on the other hand, contends that everything connected with the signing and issuing of the warrants and orders by him was done legally and in execution of the orders of the county court, and that under the circumstances stated in this case no personal liability attaches upon him in respect of any acts done by him in relation thereto.

The questions for the opinion of the Court are:—

Whether, under the circumstances above stated, the execution of the warrants by Robinson was legal.

Whether, under the circumstances above stated, the defendant was justified in issuing the orders and warrants.

Waddy, Q.C. (*Cave* with him), for the plaintiff. First, the warrant, so far as it related to costs to be paid by the plaintiff was invalid. These costs were never properly taxed. They were taxed on too high a scale and in the absence of the plaintiff, and moreover, the judge could not delegate the power of taxing them to the defendant, the registrar. The Act 9 & 10 Vict. c. 95, s. 2, defines the duties of the registrar, there called the clerk, but

neither by this section nor by s. 166, has he power to tax costs such as these.

[BRAMWELL, B. But the order is good on the face of it, and the warrant recites this order.]

Secondly, the appointment of Robinson as special bailiff was illegal. There is nothing in the County Court Acts (9 & 10 Vict. c. 95, and 30 & 31 Vict. c. 142) to justify such an appointment. To avoid difficulty, the plaintiff might have been dismissed from his office and a new high bailiff appointed, or the warrant might have been addressed to the under bailiff. Sect. 22 of the Act 30 & 31 Vict. c. 142, under which the defendant professed to appoint Robinson, is explained by the previous section, and refers only to registrars invested with the powers and authorities of a high bailiff upon the abolition of his office, under the provisions of the County Courts Act, 1866. The defendant has therefore issued a warrant without jurisdiction, and is liable in trespass: *Houlden* v. *Smith.* (1)

Wills, Q.C., for the defendant. [He was requested to confine his argument to the question whether the appointment of Robinson made the warrant illegal.] There is no express provision in the County Court Acts relating to a case like the present. But in the absence of express enactment there is an inherent power in every court, as part of its constitution, to appoint an officer to execute its own process. So far back as the reign of Edward III. it is stated that such a power is by implication granted to every court: Lib. Ass. 44 Ed. 3, page 29; and in 1 Rolle's Ab. tit. "Court," p. 526 (F) "Quel chose serra incident al Court," it is said, "si le roy grant un Court per letters pattents al un corporation de un vill a tener pleas, &c., en cest case coment que la ne soit ascun clause en le pattent a faire un bailie, ou sargeant, d'executer les proces del Court, a returner juries, &c., uncore ceo est incident a lour grant a ceo faire, car autrement ils ne poient tener un Court: Mich. 14 Car. B. R., *en Metcalfe & Worseley's Case.* See also p. 490 (E), translated in Comyns' Dig. tit. "Courts" (P. 8), thus: "If the king grant conusance of pleas, the grantee shall have power to make process by petit cape, process upon voucher, or other process as incident, through no mention of it in the grant."

(1) 14 Q. B. 841; 19 L. J. (Q.B.) 170.

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As to cases where the court is erected by Act of Parliament, Comyns' Dig., tit. "Courts" (P. 4), refers to *Swinstead* v. *Lyddal* (1), where it was held that the Court of Conscience erected by 3 Jac. 1, c. 15, had by the very erection incidentally and consequentially a power to execute their process.

Secondly, s. 78 of 9 & 10 Vict. c. 95, enacts that in any case not expressly provided for by the rules and forms, the general principles of practice in the superior courts of common law may be applied to proceedings in the county courts. By the practice of the superior courts (Chitty's Archbold's Pract. 12th ed. 671), if the sheriff is party to the proceedings the writ of execution is directed to the coroner, and if the coroner is also a party then to persons appointed by the Court or a master, called elisors. The appointment of Robinson is analogous to the appointment of such an elisor. A further argument in favour of the appointment is found in the necessity of the case. The suggestion that the high bailiff is always to be dismissed where it is proposed to levy execution against him cannot be entertained, and he cannot himself execute a warrant against himself. It is immaterial that the defendant thought he was acting under s. 22 of 30 & 31 Vict. c. 141. It was not the appointment which justified Robinson, but the warrant. Lastly, the defendant merely signed the warrant as a ministerial officer for the purpose of authenticating the order and ought not to be liable: *Dews* v. *Riley*. (2)

Waddy, Q.C., did not reply.

BRAMWELL, B. We are all of opinion that the defendant is entitled to judgment. I confess I have misgivings as to what the particular question submitted to us means. I rather think, however, that it operates to deprive the defendant of any defence he might have had on the ground that he was a mere ministerial officer, and that the effect of it is, that if Robinson the bailiff would be liable in this action the defendant should be equally so. I am however of opinion that the defendant is not liable. One point made before us was, that by statute it was the office of the judge to say what costs were to be allowed, and it is said that he must personally exercise a discretion in the matter of costs. Now

(1) 1 Salk. 408. (2) 11 C. B. 434; 20 L. J. (C.P.) 264.

really when we consider that this argument depends on the word "judge" having been used in the section, and that if the word "court" had been there instead the question would not arise (inasmuch as the registrar is the officer of the Court for the purpose of taxing costs), and that the county court and the judge are one and the same thing, I cannot but think that the meaning of the provision is that the Court shall award costs in the ordinary way in which it does so, viz. by their being fixed by the registrar subject to the approval of the judge. But, further, an order, valid on the face of it, was drawn up. If improperly made it should have been set aside; but so long as that order is in existence unimpeached, it must be acted on, otherwise this absurd result would follow: that a valid order would exist, and yet the Court have no power to enforce it.

Then we come to the other question, whether the warrant, having been directed to Robinson and the other bailiffs, was valid, i.e., was there power in the Court, either with or without the assistance of the defendant, to direct a warrant, not to the high bailiff, but to "Robinson and others"? I think there was. In the first place there are the authorities cited by Mr. Wills, shewing that, as incident to the constitution of all courts, there is a power of enforcing their judgments and process. And another argument in support of this proposition is to be found in the necessity of the case, for here the defendant, being high bailiff of the very court from which the process issued, it is not conceivable that an order should issue to the high bailiff to levy on himself, otherwise this absurd consequence must follow: that if an order were made that he should be arrested, he must take himself into custody and lodge himself in gaol. Unless the Court has some power of providing means for procuring execution against the high bailiff, he would be the only one of Her Majesty's subjects not liable to process. So much for the general considerations in the case. Now I turn to the 78th section of 9 & 10 Vict. c. 95, enacting that, in any case not expressly provided for, the rules and principles of the common law shall be adopted. One of those principles is, that if a person to whom process should be directed be interested therein, the process must be delivered to another; for instance, if he should be the sheriff process must go to the coroner, and

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if the coroner be also interested, then to "elisors." Here the high bailiff was interested, and therefore—moulding the practice of the inferior by that of the superior Court—there would be a power to direct a warrant to an individual other than the high bailiff to levy. One doubt which occurred to me was, whether, inasmuch as two "elisors" are appointed in the superior court, two analogous persons should not be appointed in the county court. Perhaps a discussion might be raised on that question, but if there be any difficulty it is obviated by the form in which the warrant is drawn, viz., "to Robinson and others;" so I think there was power to issue this warrant, and I think it immaterial that the person who appointed Robinson supposed himself to be acting under a particular authority, whereas the section of the Act on which he relied as giving him that authority did not really do so. If he had, in fact, power to do it, the rule of law comes in that if a man has a general authority to do an act, and does it, he is justified, although he assumed to do it under a supposed authority which he did not possess. I think this was a properly issued warrant, and am inclined to think that if there had been no other appointment of "elisors" this nomination of them in the warrant would be a sufficient appointment.

The decision I have given renders it unnecessary to consider the other point, as to whether the proceeding in question was the act of the Court, and I express no opinion upon it. As to that it may be observed that it would be very hard if the defendant should be liable for an act which was suggested, not by him, but by the judge.

CLEASBY, B. I am of the same opinion. Upon the first question, viz., as to the order for costs, I think there is no objection whatever to what was done, and the objection could only take the form of a complaint of irregularity; and perhaps application might be made to make the proceedings more regular if they are otherwise. But the judge, having ordered that the high bailiff is to pay costs, says, in the presence of the persons interested, "The registrar will settle the amount." It is clear that, the amount being afterwards settled, the judge adopted it. There can be no doubt that that, in point of law, was the act of the Court.

The remaining question takes two forms: one, as to the liability of the defendant personally, and the other the validity of the warrant. Upon the first I agree that the matter is really not reserved for us as distinct from the question of the plaintiff's liability to costs. The real question argued by the plaintiff is as to the validity of the warrant. He asserts that it is an illegal warrant, making the defendant liable for the act of Robinson. The order is founded on s. 116 of the earlier County Courts Act, 1846, and may be enforced "by such ways and means" as are therein provided for enforcing a judgment recovered in the said Court. What are those "ways and means"? We turn to s. 94, which enacts "that whenever the judge shall have made an order for the payment of money, the amount shall be recoverable in case of default . . . by execution against the goods and chattels of the party against whom such order shall be made; and the clerk of the Court, at the request of the party" (where there is one) "possessing such order, shall issue, under the seal of the court, a writ of fieri facias as a warrant of execution to the high bailiff of the Court." That clause would be inapplicable where the defendant himself is high bailiff, but nevertheless the former part prescribing that the recovery is to be by execution is equally operative in the case of a high bailiff as in the case of an ordinary person. The latter part of s. 78 proceeds to enact that "in any case not expressly provided for herein or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied at the discretion of the judges" of the county courts "to actions and proceedings in their several courts." Now, if the attention of the judges of the superior court had been called to this case, they would, I think, have made a very reasonable rule that another officer should be appointed by the Court to execute process against one in the position of high bailiff, to whom ordinary process could not go. And that is exactly what has been done in this case, which was one of such rarity that the ordinary rules of the county court did not meet it. Perhaps it may have been unfortunate that the person appointed by the registrar came, in one sense, within the terms of s. 22 of 30 & 31 Vict. c. 142, for this section only shews that the registrar may

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appoint where he has permanently assumed the function of high bailiff.

AMPHLETT, B. I am of the same opinion. On the question as to the order for costs, the principal objection raised by the counsel for the plaintiff was that the mind of the learned judge had never been directed to the amount of these costs. The judge appears to have ordered the costs to be taxed by the registrar, and the amount of those costs was inserted in the order. When I recollected the mode in which judgments of the superior Courts are carried out, I was surprised to find any such objection. Here, in this court, judgment is given for the plaintiff or defendant, with costs to be taxed by the proper officer, and the minds of the judges are never directed to the amount unless some special objection is made. I think the order was regular, and if any objection could be made to the amount of costs assessed by the registrar, the proper course was to apply to the judge. And it appears that that very course was adopted by the plaintiff, who applied by way of summons, to the judge to review taxation, but did not proceed further. It was not afterwards in his power to object to the order for irregularity in respect of costs.

The main question, however, is as to the subsequent proceedings to enforce the order. The chief objection was that the warrant was intrusted for execution to a bailiff not properly appointed. It was suggested that the high bailiff himself should execute the process, which would involve almost an absurdity. Then it was said that the high bailiff could have been dismissed and another appointed, to whom the warrant might be directed. Dismissal, however, might be too severe a punishment for the high bailiff, and, moreover, it seems that the judge had no power to dismiss him, and that the power belonged only to the Lord Chancellor, who might require a long time to investigate the offences before acting upon them, and so the object of the warrant might be defeated; or, indeed, the Lord Chancellor might think it not a case for dismissal.

Then it was argued that the order might have been executed by the under bailiffs, but we must remember that they might be

dismissed by the high bailiff at a moment's notice, and therefore, when an under bailiff came to levy the fi. fa., the high bailiff might on the instant dismiss him from his office. So the registrar consulted the judge of the county court, who agreed that the best course to be taken would be to proceed under s. 22 of 30 & 31 Vict. c. 142, and for the registrar to appoint some stranger to execute the writ. Having looked at that section, I think that the provisions of the statute, taken altogether, evidently refer to a bailiff appointed by the registrar in those cases where the registrar and not the high bailiff has to appoint the under bailiff; so I do not think the appointment under s. 22 was a good appointment.

The next question is, whether there is necessarily a power in the judge of the county court to appoint a bailiff ad hoc. I think that he undoubtedly had that power, and should have thought that, on general principles, justified by the old authorities and year books cited, there was a clear necessary power incident to a Court to enforce its process. The moment it is found that there was a valid order made by the judge, it appears to me that he had an inherent power to appoint any other person whom he might think fit to enforce it. But the matter does not rest there, for under s. 78 of the 9 & 10 Vict. c. 95, it is enacted [the learned baron read the section]. What are the general principles of the superior Courts which are applicable here? There is a familiar case as to which the course to be taken is prescribed in the books. When the sheriff himself is a defendant, the coroners are appointed to execute process against him, and if they also are interested, a person called an "elisor," or even two elisors, may be appointed for that purpose. So here, the registrar thinking no doubt that he had power to appoint under 30 & 31 Vict. c. 142, s. 22—but whether he was right or wrong in that supposition, to my mind, matters not—ordered the warrant to be addressed to Robinson and others. I think it quite immaterial that the registrar was wrong in supposing he had power to appoint under s. 22, for I am of opinion that he had a general power of appointing any person to whom, in his discretion, he thought right to address the warrant, and that the warrant itself, being addressed to Robinson, would of itself be a sufficient appointment

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to him under the circumstances. I will only add that I think it is necessary to look into the validity of the warrant, because in the form in which the question is put to us I do not think we are at liberty to draw any distinction between the defendant and Robinson, and it was intended that the defendant should be liable if Robinson was not justified, so as to obviate another action being brought.

Judgment for the defendant.

Attorneys for plaintiff: *Stevens & Co.*
Attorneys for defendant: *Clarke, Son, & Rawlins.*

June 2.

SANDERSON AND ANOTHER *v.* GRAVES.

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Variation by Parol of Terms of Written Contract—Executory Agreement.*

The plaintiffs entered into an agreement in writing with the defendant, to let him a public-house as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years, upon the terms, amongst others, that if he sold such lease for more than 1200*l.* he should give the plaintiffs half the difference. The plaintiffs having granted him a lease of the house, which he sold for 2500*l.*, brought an action against him upon the agreement to recover one-half of 1300*l.* The defendant contended that the lease to him was granted under a substituted agreement, which was not in writing so as to satisfy the Statute of Frauds. The lease granted differed from that specified in the written agreement in the following particulars: The term was for thirty-two years, instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1200*l.* There was also no covenant against assignment without the lessor's consent, nor one binding the lessee to take his beer from the plaintiffs, as in the original agreement. These differences were the result of objections by the defendant, yielded to by the plaintiffs, who on their part required the additional rent. The jury found, however, that the stipulation as to dividing the profit remained in force or was renewed:—

Held, that the defendant was entitled to judgment, as there was a new agreement, which ought to have been in writing to satisfy the Statute of Frauds.

Semble, per Amphlett, B., that if there had been anything in writing to shew that the lease granted was accepted in substitution for that originally stipulated for, the action might have been maintained.

DECLARATION, first count: That by agreement dated the 4th of October, 1871, it was agreed between the plaintiffs and defendant that the plaintiffs should let the defendant a public house

called the Rose and Crown, for the term of one year from the 29th of September then last past, and so on from year to year with a proviso, that upon receipt of three months' notice requiring them so to do, and upon payment of 1200*l.* the plaintiffs should execute to the defendant a lease of the premises for twenty-eight years, at the rent of 100*l.* a year, and that in case the defendant should at any time after the lease dispose of the business on the premises for a larger sum than 1200*l.* the surplus should be divided into two parts, and one part paid to the plaintiffs, subject to a deduction for previous expenses incurred by the defendant in substantial alterations and repairs of the premises, and that in case the business were so sold, the plaintiffs should accept a surrender of the lease and grant a new lease to the purchaser. Averment of conditions precedent, and that premises were sold for 2500*l.* Breach, non-payment of 650*l.* There were other similar counts, and the common count for money had and received.

First plea, denial of agreement. Fifth plea, rescission of agreement. Nineteenth, to common count, never indebted.

Joinder of issue.

At the trial before Pigott, B. at the Middlesex sittings, after Trinity Term, 1874, there was a verdict for the plaintiffs for 650*l.*, with leave for the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly,

Jan. 16. Before Bramwell, Pigott, and Amphlett, B.B.:

Henry Matthews, Q.C., and *R. V. Williams*, shewed cause and cited *Smith* v. *Trowsdale* (1); *Hoadly* v. *McLaine* (2); *Souch* v. *Strawbridge* (3); *Harvey* v. *Grabham* (4); Benjamin on the Contract of Sale, 2nd ed. p. 151.

Sir J. Holker, S.G., and *A. Collins*, in support of the rule, cited *Goss* v. *Lord Nugent* (5); *Marshall* v. *Lynn* (6); *Cocking* v. *Ward* (7); *Noble* v. *Ward.* (8)

(1) 3 E. & B. 83; 23 L. J. (Q.B.) 107. 18 Q.B. 552

(2) 10 Bing. 482.

(3) 2 C. B. 808, per Tindal, C.J. at p. 814; 15 L. J. (C.P.) 170.

(4) 5 A. & E. 61.

(5) 5 B. & Ad. 58.

(6) 6 M. & W. 109.

(7) 1 C. B. 858; 15 L. J. (C.P.) 245.

(8) Law Rep. 2 Ex. 135.

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The facts and arguments in this case sufficiently appear in the judgments of Bramwell and Amphlett, BB.

Cur. adv. vult.

June 2. The following judgments were now read:—

BRAMWELL, B. In this case, the plaintiffs entered into an agreement in writing with the defendant to let him a public-house, as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years on the terms, among others, that if he sold such lease for more than 1200*l.*, he should give the plaintiffs half the difference. The plaintiffs have granted him a lease of the house, he has sold it for 2500*l.*, and the plaintiffs claim of him half the difference between the two sums, i.e. half 1300*l.* The defendant denies their right to this on the ground that the lease was not granted under the agreement above mentioned, but under a new one, which not being in writing cannot be enforced. The lease granted differed from that agreed to be granted in the following particulars. It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1200*l.* There was no covenant, as had been agreed, against assignment without the lessor's consent, nor binding the lessee to take his beer of the plaintiffs. Some other restrictive covenants agreed for were omitted. These differences between the lease mentioned in the agreement, and that granted were the result of complaint and objections by the defendant yielded to by the plaintiffs, who on the other hand, required the additional rent. The jury, however, have found, and it must be taken, that the stipulation as to dividing the surplus over 1200*l.* remained in force or was renewed, and consequently, but for the Statute of Frauds, the defendant would be bound by it.

The defendant contends that there is a new agreement, and that as it relates to an interest in land and is not in writing, it cannot be enforced. The plaintiffs say that there is no new agreement, but a substituted performance. As this performance, however, could only be substituted for the other by the agreement of the two parties, the plaintiffs and defendant, it seems to me manifest there was a new agreement, and not a new agreement as to part,

but a new agreement as to the whole. The old agreement was entirely gone, and a new agreement arose incorporating such parts of the old agreement as the parties did not choose to alter. There are not two agreements here, one made at the time of the original agreement, the other at the time when the terms were changed; nor is it one agreement, made part at one time, part at another. The rule of law is that all things to be performed by a party to an agreement on his part are the consideration for all to be performed by the other party. Let us borrow an illustration from the old style of pleading. Mutual promises would have been averred. What? Why, that it was agreed plaintiffs should grant and defendant take a lease for thirty-two years at 105*l.* and so on, and then each, in consideration of the other's promise, promised performance. From what time would the Statute of Limitations have run in an action for not granting the thirty-two years' lease? Surely from the time it was agreed that it should be granted. Suppose the agreement had then been reduced to writing, it would have contained the old terms which remained, and the new ones. This is the reason of the thing. But *Goss* v. *Lord Nugent* (1) is in point as an authority: Parke, J. says, "Here there has not been a waiver of the entire agreement, but a part of it only, and the effect of that waiver is to substitute for the original contract a new one," and see his comment in *Cuff* v. *Penn.* (2) In the judgment in *Goss* v. *Lord Nugent* (1) it is said, "the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement and partly by the new verbal agreement. See also *Marshall* v. *Lynn* (3), and *Harvey* v. *Grabham.* (4) It is true that in *Hoadley* v. *McLaine* (5), Mr. Justice Gaselee said that, "unless we establish that every alteration introduced in the progress of an executory contract is to constitute a distinct bargain requiring a distinct note in writing, there is no variance," and added, "If we were to hold otherwise, every building contract could be avoided by every addition." But no other judge put the case on that ground, and the remark may be

(1) 5 B. & Ad. 58.
(2) 1 M. & S. 21.
(3) 6 M. & W. 109.
(4) 5 A. & E. 61.
(5) 10 Bing. p. 489.

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made that, unless a note in writing is necessary in every case of alteration, it is required in none, so that under the name of alteration, something wholly different might be established. It is observable, that a building contract is not, as such, within the Statute of Frauds, and but for that statute the question cannot arise. There may be a waiver, not in writing, of part performance which is not the whole consideration, but that is not the case here.

It was contended for the plaintiffs, on the authority of a dictum of Tindal, C.J., in *Souch* v. *Strawbridge* (1), that the statute does not apply to executed contracts. But, with all respect, that cannot be true of all cases within s. 4. For, as to some of them, the question cannot arise till the contract is executed, e.g., cases of guarantee, cases in consideration of marriage. There are cases where, when the thing is executed, a defendant might be liable, e.g., on a contract to paint and deliver a picture on and not before a day distant more than a year. If at the time appointed the person ordering the picture took it, he would be held to have renewed his promise at the moment. So of any other case where the law would imply a promise on the doing of anything by the promisor. But the law implies no such promise as that relied on here on the granting of a lease. It is said this is hard and grossly unjust. No doubt the Statute of Frauds always is, in cases where the consideration is executed, as in cases of guarantees, for example, and often where the consideration is executory, but the hardship must be borne for the sake of the rule. Next, it is said that it is of continual occurrence in sales of property that some alteration is made, one piece of land substituted for another, and if that which is contended here is right, such arrangements could not be enforced. I agree they could not. It is quite certain that neither party could have enforced against the other the taking or granting of this thirty-two years' lease. It is granted on the terms contained in it. No collateral agreement in relation to it not in writing can be enforced. I am of opinion our judgment must be for the defendant.

I am glad to say that this opinion had the sanction of my lamented Brother Pigott.

(1) 2 C. B. at p. 814; 15 L. J. (C.P.) 170.

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AMPHLETT, B. In this case the plaintiffs, M. & G. Sanderson, being brewers and owners of a public-house, called the Rose and Crown, at Hackney, entered into an agreement in writing with the defendant, dated the 4th of October, 1871, for letting the said public-house to him as yearly tenant, at the rent of 160*l.* per annum, and subject to the several covenants and agreements specified in the articles numbered from one to thirteen, both inclusive; and by the twelfth article the defendant might, by giving three months' notice, and upon payment of 1200*l.*, require a lease of the said premises for the term of twenty-eight years, at a rent of 100*l.*, and subject to similar covenants as in the said agreement contained, or such of them as might be applicable to a lease of the said premises, and such others as are usually inserted in leases of public houses; and by the thirteenth article, it was agreed that in case the said tenant should at any time after the granting of the said lease sell the business for a larger sum than 1200*l.*, the excess should be divided equally between the plaintiffs and defendant. The public-house was subsequently burnt down, and by means of moneys received from the insurance office, and, as I collect, some additional moneys found by the defendant, the house was rebuilt, and after some negotiation it was arranged, and almost entirely at the request and for the benefit of the defendant, that a lease should be granted by the plaintiffs to the defendant, but that the terms should be varied from those stipulated for in number twelve in the following particulars:—

1. 800*l.* only was to be actually paid on the granting of the lease, but in consideration of other moneys which had been expended over the premises by the defendant, 1200*l.* was still to be expressed as the price paid on the granting of the lease.

2. The term was to be for thirty-two years, at a rent of 105*l.*, instead of twenty-eight years, at a rent of 100*l.* per annum.

3. Several covenants burdensome to the defendant were to be omitted.

A lease with these variations, dated the 4th of April, 1873, was accordingly granted by the plaintiffs to the defendant, and the counterpart was duly executed and signed by the defendant.

The defendant afterwards sold the premises for the sum of

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2500*l.*, exceeding the 1200*l.* by 1300*l.*, and the plaintiffs therefore claimed to be paid one moiety of such excess under the said thirteenth article, and the defendant refusing to admit the said claim, this action was brought to enforce it.

The defendant's defence at the trial was that the lease was granted in pursuance of a new parol agreement, and was not granted or accepted in lieu or satisfaction of the twelfth clause of the written agreement.

The jury found a verdict for the plaintiffs, and the defendant having obtained a rule to shew cause why that verdict should not be set aside, and a nonsuit or a verdict for the defendant should not be entered, or why a new trial should not be had, the same has been argued before us and has now to be decided.

Now, having regard to the way the question was left to them by Pigott, B., I think that the jury, in finding a verdict for the plaintiffs, must be taken to have found, so far as respects the intentions of the parties, that there was no abandonment or supersession of the written agreement, except so far as the lease granted varies from the lease stipulated for in the twelfth article. It was, however, contended before us, on the part of the defendant, that, whatever may have been the intention of the parties, the new lease, varying as it did from the terms agreed upon by the written agreement, put an end entirely to such written agreement, and that to insist now upon the thirteenth article was, in point of fact, to insist upon a new parol agreement upon the old terms, which could not be allowed consistently with s. 4 of the Statute of Frauds. And this argument was, as I understand, merely based upon the principle that when there are two distinct things agreed in writing to be done, each forming the consideration for the other, and one is actually carried into effect with variations verbally agreed upon, the other is in all cases reduced to a mere parol agreement incapable of being enforced. I must confess I cannot agree to that proposition in the broad sense in which it is expressed, for supposing the varied part of the agreement was carried into effect by an instrument in writing, shewing on the face of it that it was a mere substitution for the original, I cannot see anything in the statute to prevent the other part of the

agreement which is evidenced in writing being enforced. Nor is there anything contrary to this decided in the cases cited for the defendant of *Goss* v. *Lord Nugent* (1), *Marshall* v. *Lynn* (2), and *Harvey* v. *Grabham.* (3)

All that those cases decided was that where an agreement required by the statute to be in writing was varied by parol the Court could not enforce the contract so varied.

This, it appears to me, is a very different proposition from the one we are discussing, where the varied part of the agreement was actually executed.

If, therefore, I had found in the present case, either by a recital or other internal evidence in the new lease itself (which it must be remembered was signed by both parties), or by other written evidence under the hands of the parties, that such lease was intended only to be a substitution for the lease mentioned in the twelfth article, I should have thought that without a violation of the statute the thirteenth article could have been enforced even in a court of law. And I must confess that I have had considerable doubt whether the general similarity of the provisions in the two documents, taken in connection with the surrounding circumstances, is not sufficient to establish the substitution without the aid of parol evidence as to the intention of the parties; but, after mature consideration, I have come to the conclusion that it is not, and must, therefore, agree with my learned Brother Bramwell, that the thirteenth article cannot be enforced in a court of law, which is not yet enabled to act upon the beneficial doctrine of courts of equity in respect of part performance. The result is that the defendant will be able, as far as this Court is concerned, to hold his lease without paying what, on the finding of the jury, must be taken to be a part at least of the agreed consideration.

The plaintiff also contended that the Statute of Frauds did not apply to executed contracts, although executed on one side only, and there are some old dicta, and even decisions, that appear to bear out that view, and had it been sustained, Courts of law would have certainly made a long stride towards the adoption of the

(1) 5 B. & Ad. 58. (2) 6 M. & W. 109.
(3) 5 A. & E. 61.

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equitable doctrine of part performance. I think, however, that in the face of more modern decisions, such as *Cocking* v. *Ward* (1) and others, the older authorities on this point must be considered as overruled.

I agree, therefore, that the rule must be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Ingle, Cooper, & Holmes.*
Attorney for defendant: *H. S. Willett.*

June 23; *July* 7.

LEHAIN *v.* PHILPOTT.

Landlord and Tenant—Distress for Rent—Action for Rent barred, where Distress held but unsold.

10 C.L.D. 230

When a landlord distrains for rent and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, though it be insufficient to satisfy the rent.

Lear v. *Edmonds* (1 B. & Ald. 157) commented on.

DECLARATION for use and occupation of messuages.

Pleas, 1, never indebted; 2, Payment; 4, That the use and occupation of the messuages and premises were under a demise thereof to the defendant made by the plaintiff, whereby the defendant became indebted to the plaintiff for certain arrears of the rent thereof, and that afterwards and before suit the plaintiff took, levied, and distrained certain goods and chattels of the defendant then in and upon the demised premises, under colour and as and in the name of a distress for the arrears, which goods and chattels then and afterwards were and are of more than sufficient value to have satisfied the arrears and the costs and charges of and attending such distress, and the sale of the goods and chattels thereunder and incidental thereto, and the whole of the causes of action herein pleaded to; and the plaintiff still holds, keeps possession of, and detains the goods and chattels under the levy, and as such distress, for the arrears and not otherwise.

(1) 1 C. B. 858; 15 L. J. (C.P.) 245.

The 3rd plea was similar to the 4th down to the end of the words, "the whole of the causes of action herein pleaded to;" it then concluded with, "and the same thereby then became and were and are satisfied and discharged by such distress," without alleging that the plaintiff still held the distress, as in the 4th plea.

Issue on all the pleas.

At the trial before Pigott, B., at the Guildhall sittings in February, 1875, the following facts were proved:—By a written agreement dated the 30th of March, 1874, the plaintiff let to the defendant a shop in Southampton Street, Strand, for one year from Lady Day, 1874, for 60*l.*, the rent to be paid in twelve equal instalments, namely, 5*l.* on the 25th day of each succeeding month. The defendant entered and occupied and paid the plaintiff 5*l.* for the first month's rent. About the 19th of August the plaintiff distrained for 15*l.* in respect of the three months' rent overdue, had the goods appraised, and retained them until the trial, without having sold them. On the 9th of September he issued a writ and brought this action to recover 20*l.* for the four months' rent due on the 25th of May, 25th of June, 25th of July, and 25th of August respectively. The jury found upon the evidence that there was an eviction by the plaintiff in August and before the 25th: and that the goods distrained and held as a distress were worth 8*l.* Pigott, B., thereupon entered the verdict for the plaintiff for 15*l.* for the three months' rent.

A rule nisi having been obtained for "a new trial on the ground that the plaintiff was not entitled to bring an action for his rent whilst he held a distress for the same rent,"

June 23. *Anstie*, for the plaintiff, shewed cause. The question arises on the 4th plea, and is, whether, when a landlord distrains for rent and holds the distress without selling it, and it is proved that the distress is insufficient to satisfy the rent and costs of distress, he is barred from bringing an action for the rent. *Lear* v. *Edmonds* (1) is a decision that he is not barred even though the distress be sufficient, provided the rent be not in fact satisfied;

(1) 1 B. & Ald. 157.

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for there the demurrer admitted the truth of the statement in the plea that the distress was sufficient. The present case is stronger for the landlord, for it was found by the jury not only that the rent was not satisfied, but that the distress was worth only 8*l.*, the rent being 15*l.* Bayley, J., there says, "The language of the statute 2 Wm. & M. sess. 1, c. 5, is that the person distraining *may* sell the goods, not that he *must*; if so, then does he not stand as he did at common law before the statute? for it is not averred that the goods distrained were sold." It cannot be that merely detaining the distress without satisfaction is a bar to an action for the rent; for if so the right of action is gone for ever, according to the old rule that a right of action once suspended is for ever lost. There is no reason why the landlord should not have both remedies, just as a mortgagee or pawnee has: *Lockhart* v. *Hardy*. (1)

Bovell, for the defendant, supported the rule, and discussed the authorities which are cited in the judgment. He also referred to *Williams* v. *Price* (2); *Smith* v. *Ashforth* (3); *Quin* v. *Wallace*. (4) He also contended that in 2 Wm. & M. sess. 1, c. 5, s. 2, the words "it shall and may be lawful to sell," mean that the landlord must sell, and cited *Piggott* v. *Birtles* (5), per Parke B.; *Reg.* v. *Mayor of Harwich* (6); and the notes to *Simpson* v. *Hartopp*. (7)

Cur. adv. vult.

July 7. The judgment of the Court (Bramwell, Cleasby, and Pollock, BB.) was delivered by

CLEASBY, B. In this case, to a declaration for use and occupation, there was a plea that the occupation was under a demise at a fixed rent, and that the plaintiff had taken a distress for the rent sued for of sufficient value to satisfy the rent, and that he still held the distress at the time when the action was brought. There was no demurrer to this plea, but issue was joined upon it, and the case went down to trial, and the jury found the rest of the plea

(1) 9 Beav. 349.
(2) 3 B. & Ad. 695.
(3) 29 L. J. (N.S.) Ex. 259.
(4) 6 Wharton's Pennsylvania Rep. 452.
(5) 1 M. & W. 441, 448.
(6) 8 A. & E. 919.
(7) 1 Sm. L. C. 385, 6th Ed.

proved, but that the distress taken was not of sufficient value to satisfy the rent. The verdict was entered for the plaintiff, but a rule was obtained for the defendant to set aside the verdict, and for a new trial on the ground that the value of the distress was an immaterial part of the plea, and that the plea was a good answer without incorporating the sufficiency of the distress.

The case was very well argued for the plaintiff by Mr. Bovell, before my Brothers Bramwell, Pollock, and myself. The first question is whether the plea, as it stood, was a good plea, because, although there was no demurrer to it, if the whole plea was no answer, then every averment was equally material, and it must be proved as alleged.

Upon the question whether levying distress for rent took away or suspended the right to maintain a personal action to recover it while the distress continued, we were referred to many authorities.

In the case of cattle taken damage feasant, and impounded and detained as a distress, the authorities clearly establish that no action of trespass is maintainable so long as the distress is detained or not accounted for. This was determined after full argument, in very clear judgments from Holt, C.J., and the other judges in *Vaspor* v. *Edwards.* (1)

This has never been dissented from, and the reason of the conclusion is that when the law gives a man two remedies, one by a sort of execution by levying a distress, and the other by a personal action, he cannot, if he chooses to resort to the former, have his action as long as the distress is in force. It seems to have been considered in early times that when a man adopted his remedy by distress which the law gave him, he made an election, and could not afterwards have his personal action at all; and Turton, J., in the beginning of his judgment in the case referred to, says, "The plaintiff had his election of two remedies, trespass or distress, and using of one is an utter waiver of the other;" and Littleton (2), ss. 219, agrees with this. But this doctrine of election, founded originally upon some distinction between a real remedy and a personal one is, I should say, obsolete, and all the late

(1) 12 Mod. 658, also reported sub nomine *Jasper* v. *Eadowes*, 11 Mod. 21; and in 1 Ld. Raym. 719; 1 Salk. 248.

(2) Littleton's Tenures by Cary, B. 1. s. 219, referring to a grantee of a rent-charge.

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authorities take no notice of it, though it would have been conclusive if effectual. The question in that case was as follows:—Action of "trespass quare clausum fregit, and fed his grass with a pig." Plea, that the plaintiff had distrained the pig damage feasant and impounded it. Replication, that the pig escaped without the consent of the plaintiff. Held, ill, for not alleging that it was without the default of the plaintiff. This is therefore a clear authority that the distress is an answer to the act of trespass till it is ended without the plaintiff's default. The analogy between the case of distress taken damage feasant and distress for rent is obvious. At common law each was only a pledge; the distress for rent is more a voluntary act than the distress damage feasant, because in the latter case the man may be said to be acting on the compulsion of the trespass.

There are certainly good reasons for holding that a man who has distrained for rent shall not have his action until the result of the distress is ascertained; for by taking the distress he compels the tenant either to lose his goods (or before the statute 2 Wm. & M. sess. 1, c. 5, the use of them), or replevy. Now if in order to preserve his goods he replevies, he must give a bond to prosecute his suit with effect, and he must bring his action, and then the avowry and plea raise the question of the right to the rent in the same way as the action of covenant. It is therefore reasonable to say that the landlord who has compelled the tenant to bring his action to try the right to the rent shall not have his own action until the former is disposed of. And the authorities (although there are some late ones apparently to the contrary) are clear upon the subject.

We were referred to the Year Books, and we have the early entries of Rastell, for the question must then have frequently occurred. They are in p. 176a; it is only necessary to refer to one, placitum 8. After another plea, it proceeds, as regards a claim for rent, that the plaintiff ought not to have his action, because he seized divers goods and chattels as a distress for the rent, and still detains the same. The replication is merely a traverse of the fact that he made the seizure in question as a distress. Thus the distress, while detained, was certainly considered a good answer then. And accordingly, in the case of *Vaspor* v. *Edwards* (1), already referred

(1) 12 Mod. 658.

to, where the effect of a distress taken damage feasant which had escaped was considered, it seems to have been thought clear that in the case of a distress for rent it was an answer to the declaration.

In that case the judgment was given after great consideration; and Gould, J., says: "For the party has the goods as a pledge, and as long as that continues he shall not have any other remedy; but once it ceases to be a pledge, his action is restored to him;" and further on, "The plea is bad; it is that nomine districtionis he took and impounded; but that is not enough, for he should have said further that he still does detain the distress." He afterwards, referring to the entry in Rastell, p. 175, says, "Where a distress for rent is so pleaded and shewed to continue, so here as long as it is shewed that the plaintiff has a gage or pledge, so long it is a bar." Powis, J., says, "If the cattle die in pound, he may distrain in case of rent, or bring debt; ergo, if they die in case of damage feasant he may bring trespass."

Turton, J., also considers the case of distress for rent clear, and refers to it as an argument. He says: "And distress sufficient to satisfy the rent is a good plea in bar to debt for the rent; so, by parity of reason, in trespass." Holt, C.J., in his judgment, does not refer to the case of rent; but in the case of *Alton* v. *Jarvis* (1), he says: "'Distraining' is 'levying.' If a man distrain for rent and impound the distress, and then bring debt for the same rent, the defendant may plead 'levied by distress.'" This is not the matter decided, but put as clear, and is given in Viner's Abr. Debt (I. 2), s. 8.

To come to later authorities, the effect of a distress for rent came before the Court of Queen's Bench in the case of *Edwards* v. *Kelly*. (2) The real question in that case was whether a promise to pay the rent by a stranger upon the withdrawal of the distress was a promise to be answerable for the debt of another, and so the question becomes whether the debt for the rent still continued while the distress was in force; and upon that Bayley, J., says: "After the plaintiff had distrained he held in his own hands his remedy for recovering the rent, and the tenant was at that time

(1) 11 Mod. 144. (2) 6 M. & S. 204.

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no longer indebted, for so long as the landlord held the goods under distress, the debt due from the tenant was suspended." And Holroyd, J., a most careful and accurate judge, says: "If debt were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer, which shews that the debt was for the time suspended." He thinks it clear that the distress would be an answer, and draws the conclusion from it.

The above reasons and authorities seem to establish clearly that the existence of the distress is an answer to an action for the rent. In the case last referred to it appeared, no doubt, that the distress was of sufficient value to satisfy the rent, but all the authorities proceed upon the general principle that the taking and holding of the pledge takes away the right to bring the action, without reference to the value. The dictum of Turton, J., is the only authority which makes the value of the distress the test. The value of the distress must be a matter quite uncertain; and if, being supposed to be of sufficient value, it suspends the remedy for rent altogether, it would be most unreasonable to say that, as it is the act of the landlord who chooses to distrain certain articles, the doing so, provided they should be of insufficient value, leaves the remedy by action open for the whole rent. And if not for the whole rent, then it is impossible to say for what part. As long as the distress remains, the tenant cannot tell what amount to pay into Court to satisfy the uncertain balance. It certainly seems more reasonable to say, in accordance with the precedents and current of authorities, that the levying the distress for the whole rent suspends the remedy for the whole rent as long as the distress continues a pledge. If the goods were insufficient to meet the whole arrears, the landlord might have distrained in respect of one month's rent, and have proceeded by action for the residue.

We have now only to deal with some late authorities which appear to be at variance with the conclusion arrived at, but which I think are not really so.

The distinction is this, that in these cases the plea only alleged that the landlord took and detained, and did not go on to say that he still, at the commencement of the action, continued to detain.

The first case relied upon was that of *Lear* v. *Edmonds* (1), decided in the same year and by the same judges as *Edwards* v. *Kelly*. (2) In that case the plea was that the plaintiff took and detained the goods as a distress, the same form as in *Vaspor* v. *Edwards* (3), which was then held bad. It does not shew that the pledge or levy continued in force at the commencement of the action. The ground of decision is not quite clear; it rather appears to be that the mere seizure was not satisfaction, and the defendant had alleged nothing more, as he ought to have done, the facts being in his knowledge.

But the case is also reported in 2 Chitty's R. p. 301, under the name of *Deare* v. *Edmunds*, and there the reasons appear. Bayley, J., in the course of the arguments, says: "it does not appear how long the distress was detained;" and Abbott, J., says: "The mere statement of the taking of a distress without saying how long the same was detained, is not a satisfaction;" and Bayley, J., in his judgment, puts it on the ground that the plea does not go far enough in not accounting for the distress.

So that this case, which was the principal one relied on in the argument, is really no authority whatever that the action could be brought while the distress was in the hands of the landlord.

This case was followed and acted upon in two subsequent cases, *Lingham* v. *Warren* (4), and *Hudd* v. *Ravenor* (5), but in those cases the only decision was that the taking of a distress, though of a sufficient value, was not of itself a satisfaction.

It is worthy of notice that all these authorities were brought under the notice of the Court of Common Pleas in the case of *Dawson* v. *Cropp*. (6) The question there was very much one of pleading, but a substantial question was involved, whether, after a distress for rent had been made, another distress could lawfully be made for the same rent while the first was not accounted for—a similar question to the present one, though not the same—and it was held that it could not. In an elaborate considered judgment Tindal, C.J., says, p. 971: "Assuming that the rent remained due,

(1) 1 B. & Ald. 157.
(2) 6 M. & S. 204.
(3) 12 Mod. 658.
(4) 2 B. & B. 36.
(5) 2 B. & B. 662.
(6) 1 C. B. 961.

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not having been satisfied by the first distress (and the case of *Lear* v. *Edmonds* certainly did not go beyond that), still the landlord could not make a second distress." This shews that the case of *Lear* v. *Edmonds* was only considered as deciding that a distress is not of itself a satisfaction of the rent, which is not disputed.

I only desire further to refer to the case of *Rex* v. *Cotton* (1), where the question was, whether goods taken as a distress for rent could afterwards be seized for the king's debt before sale, and the general nature and effect of a distress is fully gone into in a most ably considered judgment of Parker, C.B. In the course of the judgment (2) he says, it was argued, "secondly, that levying by distress was a good bar, and 1 Salk. 248, was cited; to which I answer, that it is agreed in that case that if the distress dies in the pound, or escapes without default of distrainer, he may distrain again; and so he may distrain de novo where the distress legally evicted without his default; for *levying* distress is only a temporary bar, and no satisfaction."

For the above reasons I am of opinion that the plea was a good plea, because as long as the distress continued the action of debt could not be brought; and that if the distress was held, it was immaterial what was its value, and could not properly be decided, and therefore enough of the plea was proved to make a defence; and so the rule must be made absolute.

My Brothers Bramwell and Pollock concur in this judgment.

Rule absolute.

Attorneys for plaintiff: *John C. Button & Co.*
Attorney for defendant: *A. A. L. Harrison.*

(1) 2 Ves. Sen. 287. (2) 2 Ves. Sen. at p. 295.

LUCAS *v.* MASON.

1875
July 7.

Master and Servant—Liability for Trespass—Chairman at Public Meeting—Order to remove Person making Disturbance.

On the trial, in an action for assault, the plaintiff proved that he was present in the gallery of a large hall where there was a meeting convened by members of an association, and that the defendant acted as chairman. There was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance, but, according to his statement, he was seized by a man with a white ribbon in his coat and two policemen, and dragged over some benches to the front part of the gallery, and thereby injured. There was nothing to shew the position or duty of those who seized him, or whether any instructions as to keeping order had been given them by the defendant, before the act complained of:—

Held, that there was no evidence to go to the jury of any liability on the part of the defendant, as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff; but only a particular direction as to a particular matter, and that the words used by the defendant did not authorize the officers to act upon their judgment as to who were the persons making the disturbance.

Action for assault. Plea, not guilty. Joinder of issue.

At the trial before Pollock, B., at the Manchester spring assizes, 1875, the learned Baron nonsuited the plaintiff. A rule nisi to set aside the nonsuit having been obtained,

June, 24, 25. *Edwards, Q.C.*, (*Pope, Q.C.*, with him), shewed cause.

Torr, Q.C., and *R. H. Collins*, supported the rule.

Cur. adv. vult.

The facts and arguments sufficiently appear in the judgment.

July 7. The judgment of the Court (Bramwell, Cleasby, and Pollock, BB.) was delivered by

Pollock, B. The plaintiff in this case by his declaration alleged that the defendant assaulted and injured him, to which the only plea material to the question now before us is not guilty.

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The cause was heard before Pollock, B., at the last Manchester assizes, when the plaintiff, being called as a witness, proved that he was present in the gallery of a large hall where there was a meeting convened by members of the Church Liberation Association, and the defendant acted as chairman.

In the course of one of the speeches there was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance. The plaintiff stated that, upon this, a man with a white ribbon in his coat and two policemen seized him and dragged him over some benches to the front part of the gallery, whereby he was bruised and injured. Counsel for the defendant submitted that there was no evidence which ought to be left to the jury of the liability of the defendant for the acts of those who so seized the plaintiff, and the learned judge being of that opinion, nonsuited the plaintiff.

It was not shewn at the trial what was the position or duty with relation to the meeting in question, either of the man with the white ribbon or of the two policemen, nor that any instructions had been given to them by the defendant, or any one else, before the act complained of, as to keeping order or otherwise. We think, however, it must be assumed that the man with the white ribbon was in the position of a steward, whose duty it would be to assist the chairman in keeping order should any disturbance arise. It must also, we think, be assumed that what was done by the man with the white ribbon and the two policemen was done under the honest, though mistaken, belief that the plaintiff was one of those who were making the disturbance. It was not suggested in the argument before us that the defendant had been personally guilty of any wrongful act, or that he had by express instructions authorized, or by subsequent ratification adopted, the wrongful act complained of. If, therefore, any liability attached to the defendant it must be in consequence of the general relationship which existed between the defendant and those who brought the plaintiff forward, or because his order to bring the disturbers to the front, meant, "Determine who are disturbers, and when you have done so, bring

forward those whom you so determine to be disturbers." Under these circumstances it becomes necessary to consider whether there was any evidence to show that the defendant's order had that meaning, or would reasonably be so understood by those to whom he gave it, and whether, upon any principle of law, the defendant could be made liable in this action. Where the trespass complained of is the direct and necessary consequence of an order given for its committal, the person who gives the order is clearly liable for the consequences, as much as if the trespass were done by his own hand; and where the relation of master and servant exists the former is liable for the tortious acts of the latter wherever they are such as come within the scope of the servant's general duty, although in doing the particular act complained of he may have exceeded his authority, provided what he does is in the honest belief that he is executing his master's orders; for in most cases where a duty is to be performed or an act done by a servant, some discretion must be vested in him to whom the doing of it is committed, and, where this is so, the master cannot enjoy the benefit of his servant's acts which involve this discretion without being responsible for their result.

This rule holds especially where the master is absent, and the duty to be performed vicariously is general in character, as in the case of conductors of public vehicles, railway servants, and the like. Thus, in *Seymour* v. *Greenwood* (1) the Court of Exchequer Chamber held the defendant, who was the owner of an omnibus, liable for the act of his guard in removing a passenger whom he supposed to be drunk, for, as was said by the Court, "The master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself."

In the present case there was no relation of master and servant, or of principal and general agent, or agent for such cases as might occur in the absence of the principal, but a particular direction as to a particular matter, and this, in our judgment, not only prevents the decisions referred to binding us as authorities, but makes them inapplicable in principle. In the case of master and

(1) 7 H. & N. 355; 30 L. J. (Ex.) 327.

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servant, the character and duties attaching to the employment are known and defined beforehand, the servant who is to perform them is selected accordingly. In the present case no such relationship existed in the first instance, nor did it arise during the transaction. It is no doubt the duty of the chairman of a meeting, where a large body of people are gathered together, to do his best to preserve order, and it is equally the duty of those who are acting as stewards or managers to assist him in so doing, but the nature and extent of this duty on both sides cannot be very closely defined à priori, and must necessarily arise out of, and in character and extent depend upon, the events and emergencies which may from time to time arise. There is no such pre-existing relationship as exists in the case of master and servant, and there is, we think, no ground for extending by implication an express authority limited in its terms. The disturbance which gave rise to the defendant's words took place in the presence of those who acted upon them. They were nearer to the plaintiff than was the defendant, and, if in doubt, might have referred to the defendant for further instructions. It does not, therefore, seem to us that there was any evidence which should have been submitted to the jury of a general or implied authority going beyond the limit of that which was created by the express words used, or of any authority to the persons ordered to bring the disturbers forward to exercise a discretion as to who were disturbers. The rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Bower & Cotton, for Gardner & Horner, Manchester.*

Attorneys for defendant: *Johnson & Weatheralls, for G. Hadfield, Jun., Manchester.*

NICHOLS *v.* MARSLAND.

1875
June 12.

Water stored—Water overflowing from Defendant's Land to Plaintiff's Land—Floods—Extraordinary Rainfall—Vis Major—Act of God.

One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for an escape of the water which injures his neighbour, if the escape be caused by an agent beyond his control, such as a storm, which amounts to vis major, or the act of God, in the sense that it is practically, though not physically, impossible to resist it.

On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up with artificial embankments a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell so that the artificial embankments were carried away by the pressure, and the water in the pools, being thus suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall was most excessive, and amounted to vis major:—

Held, that the action was not maintainable.

Rylands v. *Fletcher* (Law Rep. 3 H. L. 330) distinguished.

THE plaintiff sued as the surveyor for the county of Chester of bridges repairable at the expense of the county.

The first count of the declaration alleged that the defendant was possessed of lands and of artificial pools constructed thereon for receiving and holding, and wherein were kept, large quantities of water, yet the defendant took so little and such bad care of the pools and the water therein that large quantities of water escaped from the pools and destroyed four county bridges, whereby the inhabitants of the county incurred expense in repairing and rebuilding them.

The second count alleged that the defendant was possessed of large quantities of water collected and contained in three artificial pools of the defendant near to four county bridges, and stated the breach as in the first count.

Plea, not guilty, and issue thereon.

At the trial before Cockburn, C.J., at the Chester Summer Assizes, 1874, the plaintiff's witnesses gave evidence to the following effect:—The defendant occupied a mansion-house and

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grounds at Henbury, in the county of Chester. A natural stream called Bagbrook, which rose in higher lands, ran through the defendant's grounds, and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by an artificial embankment into a pool of three acres in area called "the upper pool," from which it escaped over a weir in the embankment, and was again similarly dammed up by an artificial embankment into the "middle pool," which was between one and two acres in area. Escaping over a weir in the embankment, it was again dammed up into "the lower pool," which was between eight and nine acres in area, and from which the stream escaped into its natural and original course.

About five o'clock p.m. on the 18th of June, 1872, occurred a terrible thunderstorm, accompanied by heavy rain, which continued till about three o'clock a.m. on the 19th. The rainfall was greater and more violent than any within the memory of the witnesses, and swelled the stream both above and in the defendant's grounds. On the morning of the 19th it was found that during the night the violence and volume of the water had carried away the artificial embankments of the three pools, the accumulated water in which, being thus suddenly let loose, had swelled the stream below the pools so that it carried away and destroyed the county bridges mentioned in the declaration. At the pools were paddles for letting off the water, but for several years they had been out of working order.

Some engineers and other witnesses gave evidence that in their opinion the weir in the upper pool was far too small for a pool of that size, and that the mischief happened through the insufficiency of the means for carrying off the water. It was not proved when these ornamental pools were constructed, but it appeared that they had existed before the defendant began to occupy the property, and that no similar accident had ever occurred within the knowledge of the witnesses.

After hearing the address of the defendant's counsel, the jury said they did not wish to hear his witnesses, and that in their opinion the accident was caused by vis major. In answer to Cockburn, J., they found that there was no negligence in the construc-

tion or maintenance of the works, and that the rain was most excessive. Cockburn, C.J., being of opinion that the rainfall, though extraordinary and unprecedented, did not amount to vis major or excuse the defendant from liability, entered the verdict for the plaintiff for 4092*l.*, the agreed amount, reserving leave to the defendant to move to enter it for her if the Court (who were to draw inferences of fact) should be of opinion that the rainfall amounted to vis major and so distinguished the case from *Rylands* v. *Fletcher*. (1)

A rule nisi having been accordingly obtained to enter the verdict for the defendant on the ground that there was no proof of liability, the plaintiff on shewing cause to be at liberty to contend that a new trial should be granted on the ground that the finding of the jury was against the weight of evidence—

May 27. *McIntyre, Q.C.*, and *Coxon*, for the plaintiff, shewed cause. The defendant having for her own purposes and advantage stored a dangerous element on her premises, is liable if that element escapes and injures the property of another, even though the escape be caused by an earthquake or any form of vis major.

[CLEASBY, B. Was not the flood brought on to the defendant's land by vis major?]

The pools were made by those through whom the defendant claims, and if there had been no pools the water of the natural stream would have escaped without doing injury. The case falls within the rule laid down by the judgment in *Fletcher* v. *Rylands* (2), delivered by Blackburn, J.: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of vis major, or the act of God." This passage was cited with approval by Lord Cairns, C., and Lord Cranworth on appeal. (3)

(1) Law Rep. 3 H. L. 330. (2) Law Rep. 1 Ex. 265, 279.
(3) Law Rep. 3 H. L. 330, 339, 340.

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[CLEASBY, B. There the defendant brought the water on to his own land. Not so here.]

The intimation that vis major would perhaps be an excuse is not confirmed by any decision or any other dictum. But the facts here do not amount to vis major. If the weirs had been larger, or the banks stronger, the mischief would not have happened. Vis major means something which cannot be foreseen or resisted, as an earthquake or an act of the Queen's enemies.

Hughes and *Dunn* (*Sir J. Holker, S.G.*, with them), in support of the rule, cited Broom's Legal Maxims, 5th ed. p. 230: "The act of God signifies in legal phraseology any inevitable accident occurring without the intervention of man, and may indeed be considered to mean something in opposition to the act of man, as storms, tempests, and lightning: per Mansfield, C.J., in *Forward* v. *Pittard* (1); *Trent Navigation* v. *Wood* (2); *Rex* v. *Somerset.* (3)" Also *Amies* v. *Stevens* (4), *Smith* v. *Fletcher* (5), *May* v. *Burdett* (6), and *Jackson* v. *Smithson.* (7)

[The question of the verdict being against the evidence was then argued.]

Cur. adv. vult.

June 12. The judgment of the Court (Kelly, C.B., Bramwell and Cleasby, BB.) was read by

BRAMWELL, B. In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or vis major. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country: yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or vis major. No doubt not the act of God or a vis major in the sense

(1) 1 T. R. at p. 33.
(2) 3 Esp. at p. 131.
(3) 8 T. R. 312.
(4) 1 Str. 127.
(5) Law Rep. 9 Ex. 64.
(6) 9 Q. B. 101.
(7) 15 M. & W. 563.

that it was *physically* impossible to resist it, but in the sense that it was *practically* impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes: in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes: both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion: both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbour's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning and do mischief.

I admit that it is not a question of negligence. A man may

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use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

This case differs wholly from *Fletcher* v. *Rylands*. (1) There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case, and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. I refer to my judgment (2) in *Fletcher* v. *Rylands*, and I repeat that here the plaintiff had no right that has been infringed, and the defendant has done no wrong. The plaintiff's right is to say to the defendant, Sic utere tuo ut alienum non lædas, and that the defendant has done, and no more.

The Chief Baron and my Brother Cleasby agree in this judgment. As to the plaintiff's application for a new trial on the ground that the finding of the jury is against evidence, we have spoken to Cockburn, C.J.; he is not dissatisfied therewith, and we cannot see it is wrong. Consequently the rule will be absolute to enter a verdict for the defendant.

Rule absolute.

Attorneys for plaintiff: *Philpot & Son, for Potts & Roberts, Chester.*

Attorney for defendant: *E. Byrne, for Brocklehurst & Co., Macclesfield.*

(1) Law Rep. 1 Ex. 265, 279.

(2) 3 H. & C. at p. 788; 34 L. J. (Ex.) at p. 181.

Followed. NATIONAL COAL BOARD *v.* EVANS [1951] 2 K. B. 861

Approved. NATIONAL COAL BOARD *v.* J. E. EVANS & CO., LTD. [1951] 2 All E.R. 310.

HOLMES AND WIFE *v.* MATHER.

1875 *June* 24.

Trespass to the Person—Driving unmanageable Horses in the public Highway—Accidental Injury—Vis Major—Master and Servant.

To maintain an action for injury to the person the injurious act must be wilful or the result of negligence.

The defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside his servant, was requested by him not to interfere with the driving, and complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one:—

Held, that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards the plaintiff was not a wrongful act.

Quære, whether, if an action would have lain against the servant, it would also have lain against the defendant.

THE first count of the declaration alleged that the female plaintiff was passing along a highway, and the defendant so negligently drove a carriage and horses in the highway that they ran against her and threw her down, whereby she and the male plaintiff were damnified.

The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff and wounded her, whereby, &c.

Plea, not guilty, and issue thereon.

At the trial before Field, J., at the spring assizes for Durham, 1875, the following facts were proved:—In July, 1874, the defendant kept two horses at a livery stable in North Shields, and wishing to try them for the first time in double harness, had them harnessed together in his carriage. At his request a groom drove, the defendant sitting on the box beside him. After driving for a short time, the horses being startled by a dog which suddenly rushed out and barked at them, ran away and became so unmanageable that the groom could not stop them, though he could to some extent guide them. The groom begged the defendant to leave the management to him, and the defendant accordingly

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did not interfere. The groom succeeded in turning the horses safely round several corners, and at last guided them into Spring Terrace, at the end of which and at right angles runs Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they arrived at the end of Spring Terrace the horses made a sudden swerve to the right, and the groom then pulled them more to the right, thinking that was the best course, and tried to guide them safely round the corner. He was unable to accomplish this, and the horses were going so fast that the carriage was dashed against the palisades in front of the shop; one of the horses fell, and at the same time the female plaintiff, who was on the pavement near the shop, was knocked down by the horses and severely injured. The jury stopped the case before the close of the evidence offered on the defendant's part, and said that in their opinion there was no negligence in any one. The plaintiff's counsel contended that since the groom had given the horses the direction which guided them against the female plaintiff, that was a trespass which entitled the plaintiffs to a verdict on the second count.

The verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for 50*l.* on the second count, the Court to be at liberty to draw inferences of fact, and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised.

Herschell, Q.C., having obtained a rule nisi to enter the verdict for the plaintiffs for 50*l.*, pursuant to leave reserved, on the ground that, upon the facts proved, the plaintiffs were entitled to a verdict on the trespass count,

C. Russell, Q.C., and *Crompton*, for the defendant, shewed cause. The plaintiffs' contention is, that the driver gave that direction to the horses which turned them on to the plaintiff; but that is not clear upon the evidence. The horses swerved to the right, and the driver then pulled them further to the right, thinking he could turn them completely round, and so stop them. The horses struck the plaintiff while the driver was trying to pull them away from her. Therefore the injury was not caused by the immediate act of the

driver. The jury having found that there was no negligence, the action is not maintainable in any form. This principle is laid down in the judgment of the Exchequer Chamber, in *Fletcher* v. *Rylands* (1):—"But it was further said by Martin, B., that when damage is done to personal property, or even to the person by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the foot-path of a public street and kills a passenger: *Hammack* v. *White* (2): or where a person in a dock is struck by the falling of a bale of cotton which the defendants' servants are lowering: *Scott* v. *London Dock Co.* (3); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident."

True, there are dicta in *Leame* v. *Bray* (4) that negligence is immaterial, but there is no such decision. In that case and *M'Laughlin* v. *Pryor* (5) there was evidence of negligence for the jury. So in *Wakeman* v. *Robinson* (6), where Dallas, C.J., said: "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie;" and see *Gibbons* v. *Pepper*. (7) But assuming that the driver is liable in trespass, the defendant took no part in the management of the horses, and

(1) Law Rep. 1 Ex. 265, 286.
(2) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.
(3) 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.
(4) 3 East, 593, 599.
(5) 4 Man. & G. 48.
(6) 1 Bing. 213, 215.
(7) 1 Lord Raym. 38.

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was not a participator in the trespass. Assuming, for the sake of argument, that the relation of master and servant existed between the defendant and the groom, the mere presence of the master on the box is not enough to fix him with liability for the trespass of the servant, though it might in an action on the case for negligence. (1) The groom had no implied authority from his master to commit this trespass; the groom expressly took on himself the responsibility of management. Trespass lies where the injury sued for is caused by the immediate and wilful force of the defendant; or by his immediate force without wilfulness. But whether the act of the groom in guiding the horses on to the plaintiff be considered immediate and wilful or not, in no sense was it the immediate force of the defendant, and this is essential in trespass, *Sharrod* v. *London and North Western Ry. Co.* (2), where Parke, B., delivering the judgment of the Court, said: "When the act is that of the servant in performing his duty to his master, the rule of law we consider to be that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master." There the plaintiff's sheep got upon the defendants' railway through defect of fences, and were run over by a locomotive driven by the defendants' servants. Held, that, whether the facts would or would not support an action on the case, trespass would not lie. *Chandler* v. *Broughton* (3) is the only case where a defendant has been held liable in trespass in consequence of his mere presence at the time, and there negligence in putting the horse into a gig, was proved, for which he was as much responsible as the driver. In the words of Manley Smith's Master and Servant, 2nd ed. p. 209, citing *M'Manus* v. *Crickett* (4): "Unless there be evidence of the concurrence of the master's will in the act of the servant, a master can in no case be treated as a trespasser for the act of his servant."

(1) See per Bayley, B., in *Moreton* v. *Hardern*, 4 B. & C. 226, citing *Huggett* v. *Montgomery*, 2 N. R. 446.

(2) 4 Ex. 580, 586.

(3) 1 C. & M. 29.

(4) 1 East, 106.

Herschell, Q.C., and *Gainsford Bruce*, in support of the rule. But for the act of the groom in directing the horses on to the plaintiff, they would have run into the shop, and the plaintiff would have escaped. The groom may have been doing better for himself and the defendant in avoiding the shop, but that does not justify him in guiding the horse on to the plaintiff. That direction having been given by the immediate act of the driver, an action of trespass lies: *Leame* v. *Bray*. (1) There the defendant accidentally, and not wilfully, drove his carriage against the plaintiff's carriage, and the question being whether the proper remedy was trespass or case, it was held that the plaintiff had rightly brought trespass. Grose, J., said: "Looking into all the cases from the Year Book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." And Lord Ellenborough says: "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." This was followed and approved in *M'Laughlin* v. *Pryor*. (2) It is not disputed that the groom was doing all he could to stop the horses, but as he still retained some control over them, the injury was the immediate result of his act. Herein lies the distinction between the present case and *Hammack* v. *White* (3), where the defendant had no control whatever over the horse, and did all in his power to prevent him going where he did. Here the driver exercised control so far as to pull them away from one direction into another, which took them on to the plaintiff.

[BRAMWELL, B. He was trying to divert them from that direction, but failed. It is not as if he had said, "I must either drive into the shop or on to the plaintiff, and I'll do the latter."]

In *Hammack* v. *White* (3) there was no count in trespass, and the

(1) 3 East, 593, 599.
(2) 4 Man. & G. 48.
(3) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

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present point was not taken. It only remains, then, to shew that the defendant is as much responsible as if he had himself driven, and this is conclusively established by *Chandler* v. *Broughton* (1), which was trespass for driving a gig against the church in Langham Place. The defendant was sitting by his servant, who drove, and the horse ran away, and did the mischief. The plaintiff having obtained a verdict, Bayley, B., reserved the point whether the action should have been in case, but a rule nisi to enter a nonsuit was afterwards refused. Bayley, B., in giving judgment, said: "The rule is this: if master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master. . . . I think that where the master is sitting by the side of his servant, and the servant does an act immediately injurious to the plaintiff, an action of trespass is the proper remedy." This decision and that of *Leame* v. *Bray* (2) were followed and approved in *M'Laughlin* v. *Pryor*. (3) There the defendant hired for the day a carriage and horses, which were driven by postillions in the service of the owner of the horses, the defendant sitting on the box. The postillions drove against the plaintiff's gig and injured it: held, that the defendant was liable in trespass, though the postillions were not his servants. It is immaterial that in all these cases there was negligence in the drivers; for, in considering whether trespass will lie, negligence is not regarded. It is not an element in the question of trespass to land—why should it be in trespass to the person? In *Read* v. *Edwards* (4) it was discussed whether the owner of a dog is not answerable in trespass for every unauthorized entry of the animal on to the land of another; and though the point was left undecided, the only doubt entertained was one arising from the nature of the dog as distinguished from oxen or horses. Willes, J., there referred to a case in the Year Book, 20 Edw. 4, Mich. Term., pl. 10., where the judges held that trespass lay against the defendant, whose beasts having been turned out on an uninclosed place where the defend-

(1) 1 C. & M. 29.
(2) 3 East, 593, 599.
(3) 4 Man. & G. 48.
(4) 17 C. B. (N.S.) 245; 34 L. J. (C.P.) 31.

ant had common, entered the adjoining land of the plaintiff, and depastured his herbage, without the defendant's knowledge. This case was also cited by Blackburn, J., in *Fletcher* v. *Rylands*. (1) The defendant by his own volition set the carriage and horses in motion; and if the result is that he can only save himself by injuring the plaintiff, there is no justification for the injury. If somebody must suffer, why should it be the innocent plaintiff, instead of the defendant, who chose to exercise his horses in the public streets?

[BRAMWELL, B., referred to *Mouse's Case*. (2)]

BRAMWELL, B. I am inclined to think, upon the authorities, that the defendant is in the same situation as the man driving; but, without deciding that question, I assume, for the purposes of the opinion I am about to express, that he is as much liable as if he had been driving.

Now, what do we find to be the facts? The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is the best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye and so injured it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

That is the general view of the case. Now I will put it a little more specifically, and address myself to the argument of Mr. Herschell. Here, he says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the

(1) Law Rep. 1 Ex. 280. (2) 12 Co. Rep. 63.

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direction of the plaintiff—he drove them there. It is true that he endeavoured to drive them further away from the place by getting them to turn to the right, but he did not succeed in doing that. The argument, therefore, is, if he had not given that impulse or direction to them, they would not have come where the plaintiff was. Now, it seems to me that argument is not tenable, and I think one can deal with it in this way. Here, as in almost all cases, you must look at the immediate act that did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked to the last act but one, you might as well argue that if the driver had not started on that morning, or had not turned down that particular street, this mischief would not have happened.

I think the proper answer is, You cannot complain of me unless I was immediately doing the act which did the mischief to you Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. That is not the case at all. The driver was endeavouring to guide them indeed, but he was taken there in spite of himself. I think the observation made by my Brother Pollock during the argument is irresistible, that if Mr. Herschell's contention is right, it would come to this: if I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force vi et armis, trespass is the proper

remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions. In *Sharrod* v. *London and North Western Ry. Co.* (1) the master was not present. In *M'Laughlin* v. *Pryor* (2) the defendant was present, and was supposed to be taking part in the control of the animals. In *Leame* v. *Bray* (3) there was an act of direct force vi et armis, and there was negligence. I think, therefore, that our judgment should be for the defendant.

I think I could distinguish the case cited from the Year Book, but I will only say that there the defendant let out animals, liable to stray, whether frightened or not, in a place not inclosed, and without anybody to keep them in bounds.

CLEASBY, B. I would only add a word as to a point on which my Brother Bramwell has not given judgment, and that is this. This is not a case where the act that is done must be justified, as where a man does a particular thing to avoid something else, but it is a case where it must be shewn that it was the act of the defendant himself. I sum up all in these words: in my opinion, the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all.

I want to say one other word. In my opinion it is not clear that the act was the act of the master. To obtain a true test, we must look at all the circumstances, and particularly at the position of things where persons are placed in a peculiar situation of danger. Here I understand the case to be this: the master not having the same capacity for managing the horses, and being perhaps alarmed and anxious to interfere, the servant says, "Leave it to me, do not take any part." The master complies. That would absolve him as far as any question of personal negligence is concerned; and at that moment I think the act of the servant ceased to be the act of the master. I think, in support of that, I need only read this passage from the judgment of

(1) 4 Ex. 580. (2) 4 Man. & G. 48.
(3) 3 East, 593, 599.

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Parke, B., in *Sharrod* v. *London and North Western Ry. Co.* (1), where he says: "In all cases where a master gives the direction and control over a carriage, or animal, or chattel to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent—no more."

POLLOCK, B. concurred.

Rule discharged.

Attorney for plaintiff: *S. R. Hoyle, for Pybus, Newcastle.*

Attorney for defendant: *S. W. Johnson, for Tinley, Adamson, & Adamson, North Shields.*

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BODDINGTON *v.* ROBINSON.

Grant—Freehold Estate to take Effect in futuro—Habendum controlled by Express Grant in Premises—Construction.

R. was tenant for life of a house and premises, of which (subject to his life) he had made two leases, a lease expiring on the 13th of November, 1864, and a lease to J. expiring on the 13th of November, 1874.

On the 10th of November, 1864, R. executed a deed, by which, in consideration of a yearly rent of 50*l.* he granted and leased the property to J., his executors, administrators, and assigns, habendum from the 13th of November "for the term of R. for the term of his natural life":—

Held, that this deed was not void on the ground that it purported to create a future estate of freehold, as there was in the premises of the instrument an express grant of the life estate in præsenti, which was not controlled by the habendum.

EJECTMENT to recover possession of a public-house.

At the trial before Pollock, B., at the last Lancashire spring assizes, it appeared that one Royle, being tenant for life of the house, had granted a lease of it, at a rent of 42*l.* to one Tyrer, for ten years, expiring on the 13th of November, 1864. In 1858 Royle made another lease of the house to one Johnson for ten years (if Royle should so long live), from the 13th of November, 1864, when the previous lease would expire.

On the 10th of November, 1864, a deed was made between Royle and Johnson. By this deed, which was inartificially drawn, it was witnessed that in consideration of the rent thereinafter

(1) 4 Ex. at p. 586.

named (50*l.*), Royle "granted, demised, and leased to Johnson, his executors, administrators, and assigns," the house in question, "to have and to hold the land and house, &c., hereby demised unto Johnson, his executors, administrators, and assigns, from the 13th of November for the term of the aforesaid John Royle for the term of his natural life." Previously, on the 17th of February, 1864, Johnson had made an underlease to the plaintiff for ten years less ten days, from the 13th of November, 1864. On the 1st of October, 1870, the plaintiff granted a lease of the house to the defendant till the 29th of September, 1874. On the 10th of March, 1874, Johnson made a lease to the defendant for twelve years, from the 29th of September, 1874. On the 31st of October, 1874, the plaintiff procured from Royle a lease of fourteen years, from the 13th of November, 1874, when Royle's first lease to Johnson expired. Under this lease the plaintiff sought to eject the defendant, who claimed under his lease from Johnson, and the question was, whether Johnson had a good title under Royle's grant to him on the 10th of November, 1864.

A verdict was directed for the defendant, with leave for the plaintiff to move.

A rule nisi having been obtained to enter the verdict for the plaintiff on the ground that the deed of the 10th of November, 1864, under which the defendant claimed, was void, and that notwithstanding it the deed of the 31st of October, 1874, under which the plaintiff claimed, was operative,

June 26. *Ambrose, Q.C.*, and *Crompton*, shewed cause, and cited *Germain or Jarman* v. *Orchard* (1); *Carter* v. *Madgwick* (2); *Goodtitle* v. *Gibbs* (3); *Buckler's Case.* (4) They also referred to 8 & 9 Vict. c. 106, s. 6.

R. G. Williams, Q.C., and *A. Bailey* (of the Chancery Bar) in support of the rule, cited Sanders on Uses and Trusts, 5th ed. vol. ii. p. 154, n. 8; Co. Litt. 133 a.

The nature of the arguments on either side will be found in the judgment of the Court.

Cur. adv. vult.

(1) 1 Salk. 346.
(2) 3 Lev. 339.
(3) 5 B. & C. 709.
(4) 2 Rep. 55, a, b.

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July 7. The judgment of the Court (Bramwell, Cleasby, and Pollock, BB.) was delivered by

CLEASBY, B. (1) The only matter argued before us in this case was whether a certain deed of conveyance, dated the 10th of November, 1864, was incapable of taking effect and void, by reason that it purported to create a freehold interest to take effect in futuro.

Several questions were debated with much ability and research, but the argument turned chiefly upon the question whether, although the habendum in the deed purported to create such a freehold, still as, in what are called the premises, there is a grant not open to that objection, the deed could take effect in præsenti, and operate upon the estate of the grantor.

The grantor, one Royle, really had himself an estate for life and at the time of the conveyance there were three days unexpired upon a previous term, which would expire on the 13th of November, 1864, as to which it did not appear who was possessed of that term, and besides, there was a term of ten years, of which Johnson, the grantee in the deed in question, was possessed, to expire on the 13th of November, 1874. The rent reserved by that lease was 40*l.* a year. Under these circumstances, the conveyance in question was executed by Royle to Johnson. The object seems to have been to secure to Johnson the whole of the interest during Royle's life, and for any period beyond the ten years he was to pay 50*l.* a year instead of 40*l.* a year. By the deed in question, Royle granted the property to Johnson, his executors, administrators, and assigns, habendum for the term of Royle's life, to commence from the 13th of November, 1874. (2) Now undoubtedly, by the habendum, the estate of freehold was to commence in futuro, and if such an estate cannot be created since 8 & 9 Vict. c. 106, and the terms of the habendum were to govern, the deed was void. But if the grant in the premises was to govern, notwithstanding the habendum, the deed was good. Similar questions have often arisen, but not exactly as in the

(1) The judgment was read by Amphlett, B.

(2) The grant, as before stated, was from the 13th of November, without mentioning any year, but the Court inferred that the term was to commence from the 13th of November, 1874.

present case. The authorities establish, we think clearly, that if the grant in this case had been to Johnson, (omitting the words "administrators," &c.), then, as there would only be an implied estate for life in him, the express limitation in the habendum would destroy the implied estate, and as it would not in law take effect, being the creation of a freehold estate in futuro, the deed would be void. The authorities for this were, among others, *Buckler's Case* (1), and *Hogg* v. *Cross.* (2) It is also recognized as the rule in subsequent cases, particularly *Goodtitle* v. *Gibbs* (3), and indeed was hardly disputed. But the authorities also establish, we think, with equal clearness, that if the grant in the premises had been an express grant to Johnson for life, or to Johnson and his heirs, then the habendum, though void in itself, would not destroy the express grant in the premises, but the grant in the premises would take effect, of course so far as it could, upon the estate of the grantor. It is only necessary to refer to the case of *Goodtitle* v. *Gibbs* (3), and the lucid judgment of Abbott, C.J., after a full argument by Coote and Preston, in which this was expressly decided. The authorities are referred to in the judgment, *Carter* v. *Madgwick* (4); *Germain or Jarman* v. *Orchard.* (5)

We have here a third case, a grant to Johnson, his executors, administrators, and assigns, not naming any term, and the question is, under which head this case comes.

It appears to us that the present case is not a case in which there is an implied estate from the grant in the premises, but an express estate with apt words.

We are entitled to look at the interest which the grantor had, and it was an estate for his life, and proper words of limitation for granting the whole of this estate in præsenti are used, viz. to the grantee, his executors, administrators, and assigns, as was forcibly pressed upon us in argument by the learned counsel for the defendant. It is impossible to say that this is a case in which an estate is only implied in the grantee.

The deed, therefore, takes effect upon the estate which the

(1) 2 Rep. 55, a, b.
(2) Cro. Eliz. 254.
(3) 5 B. & C. 709.
(4) 3 Lev. 339.
(5) Skin. 528; 1 Salk. 346.

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grantor had, and the effect of this is that the defendant, who claims under that deed, is entitled to succeed.

This makes it unnecessary to consider the other questions argued, viz. the effect of the whole deed, taken together, as intended to convey a present interest, and the effect of the statute in removing an objection to the creation of a freehold estate in futuro.

The rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Chester, Urquhart & Co., for Potter & Knight, Manchester.*

Attorneys for defendant: *Clarke & Son, for J. R. Horner, Manchester.*

July 7.

GABARRON AND ANOTHER *v.* KREEFT AND OTHERS.
KREEFT AND OTHERS *v.* THOMPSON.

Contract—Sale of unascertained Goods—Passing of Property—Bills of Lading drawn up and indorsed by Shipper in Fraud of Consignee—Liability of Shipmaster—Charterparty providing that Master shall sign Bills of Lading as presented.

The defendants bought from one M. all the ore of a certain mine in Spain, to be shipped by M. at Cartagena on ships to be chartered by the defendants or by him. The ore was to be paid for by bills against bills of lading, or by longer bills on the execution of a charterparty, and on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Several vessels had been loaded, and others chartered, and several payments made up to March, 1872, when the *T.*, one of the chartered ships, arrived at Cartagena. The payments which had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded, so that had M. shipped ore on the *T.* he would have been entitled to no payment in respect of it. He had ore which he could and ought to have shipped, taking bills of lading to the order of the defendants. Instead of doing this, before any ore was put on board the *T.*, he telegraphed to the defendants that he would not load the *T.* on their account, and though they telegraphed to him threatening him if he did not, he loaded the *T.*, taking bills of lading, making the shipment to be by one S., and the cargo deliverable to S.'s order. No certificate in relation to this ore was ever given to the defendants. By the terms of the charterparty the captain was to sign bills of lading as presented. S. was a fictitious person, and M., after indorsing the name of S. on the bills of lading and then his own, indorsed them for value to the plaintiffs:—

Held, that the plaintiffs, as against the defendants, were entitled to the cargo; By Bramwell and Cleasby, BB., on the ground that though M. acted in breach of

his agreement, yet the manner in which the ore was put on board the *T.*, and the form in which the bills of lading were taken, shewed that the property in the ore did not pass to the defendants before or after shipment; By Kelly, C.B., solely on the ground that the charterparty justified the master in signing bills of lading, which gave the plaintiffs a title.

In an action on a charterparty by Messrs. K., the former defendants, as charterers, against the shipowner for not delivering a cargo on board the *M.* to the plaintiffs according to the charterparty, it appeared that the charterparty of the *M.*, which was one of the vessels chartered for carrying ore under the contract above-mentioned, did not authorize the master to sign bills of lading as presented, but the shipowner, by the charterparty, agreed to deliver the cargo to the plaintiffs. This cargo had also been fully drawn against, but M. obtained from the master bills of lading, as in the former case, and indorsed them for value to G., to whom the master delivered the cargo :—

Held, by the majority of the Court (Bramwell and Cleasby, BB.), that the defendant was not liable, on the ground that the master performed his contract by delivering the cargo according to bills of lading. By Kelly, C.B., dissenting, that the defendant was liable, as the property in the ore drawn against had passed to the plaintiffs, the purchasers, and as the master was not justified under the charter in giving bills of lading which were inconsistent with the rights of the plaintiffs.

THE action *Gabarron* v. *Kreeft* was a feigned issue to try the title to 400 tons of iron ore shipped at Cartagena on board a vessel called the *Trowbridge*.

Kreeft v. *Thompson* was an action by the plaintiffs as charterers against the defendant as owner of the ship *Macedonia*, the declaration stating that it was agreed between the plaintiffs and the defendant that the *Macedonia* should load at Cartagena from the factor of the plaintiffs a ballasting of 150 to 200 tons of iron, and therewith proceed to the Tyne to discharge at Tyne Dock, and deliver the same afloat to the plaintiffs or assigns on being paid freight, &c. Averment, that the ship loaded iron and proceeded to Tyne Dock, and the plaintiffs requested to have the iron delivered to them. Breach, that the defendant refused to deliver it to them. There was a second count in trover.

Pleas: First, denial of the charterparty; fifth, denial of breaches; eighth, on equitable grounds, that, after the making of the charterparty and before the alleged breach, one Gabarron and one Echeverria became assigns of the plaintiffs of the goods and of their right to have delivery made to them under the charterparty, for valuable consideration, and their property in the goods became vested in Gabarron and Echeverria, who requested the defendant

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to deliver the goods to them, which he accordingly did. Ninth, on equitable grounds, that, after the charterparty and before the alleged breach, a bill of lading, in three sets or parts, was presented and signed by the captain of the ship on behalf of the defendant, whereby he acknowledged to have received of one Sabadie the goods in the declaration mentioned, and undertook to deliver them for Sabadie to order, being paid for freight and all other conditions according to the charterparty. That the goods were loaded on board under the terms of the bill of lading; that Sabadie indorsed the bill of lading to one Munoz, who indorsed it for valuable consideration to Gabarron and Echeverria, to whom the property in the goods passed, and they required the defendant to deliver the goods to them under the bill of lading, which he accordingly did, and refused to deliver them to the plaintiffs. To second count, not guilty, and denial that the goods were the plaintiff's. Joinder of issue.

The two cases were tried together before Bramwell, B., at the London sittings after Trinity Term, 1874.

In *Gabarron* v. *Kreeft*, a verdict was entered for the defendant, with leave for the plaintiffs to move to enter it in their favour; and in *Kreeft* v. *Thompson*, a verdict for the plaintiffs for 92*l*., with leave for the defendant to move.

Rules nisi were afterwards obtained, in *Gabarron* v. *Kreeft*, to shew cause why the verdict should not be set aside and entered for the plaintiffs, on the ground that the property in the ore passed to the plaintiffs, or that the defendants were estopped from disputing that it so passed; in *Kreeft* v. *Thompson*, to shew cause why the verdict should not be entered for the defendant, on the ground that, under the circumstances, the property in the cargo passed to Gabarron & Co., or that the plaintiffs were estopped from disputing that it so passed, and also that there was no breach of the charterparty.

May 26, 28. *Benjamin, Q.C.*, and *R. E. Webster*, shewed cause, and referred to *Pickering* v. *Busk* (1); *Turner* v. *Trustees of Liverpool Docks* (2); *Thompson* v. *Dominy* (3); *Brown* v.

(1) 15 East, 38.
(2) 6 Ex. 543; 20 L. J. (Ex.) 393.
(3) 14 M. & W. 403.

Hare (1); *Gurney* v. *Behrend* (2); Benjamin on Sales of Personal Property, 2nd ed. p. 248.

Watkin Williams, Q.C., and *Arbuthnot* (*A. L. Smith* with them), in support of the rules, cited *Ellershaw* v. *Magniac* (3); *Ogle* v. *Atkinson* (4); *Falke* v. *Fletcher* (5); *The Chartered Bank of India* v. *Henderson* (6); *Gilbert* v. *Guignon* (7); *Moakes* v. *Nicholson.* (8)

Cur. adv. vult.

The facts and the inferences of fact drawn by the Chief Baron and the learned judges, together with the nature of the arguments will be found in the following judgments.

GABARRON *v.* KREEFT.

July 7. BRAMWELL, B. It will be convenient in this case briefly to state the facts, as I appreciate them. The defendants bought from one Munoz all the ore of a certain mine in Spain, to be shipped by Munoz f. o. b. at Cartagena, on ships to be chartered by the defendants or by him. The ore was to be paid for by bills against bills of lading, or on the execution of a charter, and on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. (9) Various vessels had been loaded, and others

(1) 4 H. & N. 822; 29 L. J. (Ex.) 6.

(2) 3 E. & B. 622; 23 L. J. (Q.B.) 265.

(3) 6 Ex. 570, n.

(4) 5 Taunt. 759.

(5) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146.

(6) Law Rep. 5 P. C. C. 501.

(7) Law Rep. 8 Ch. 16.

(8) 19 C. B. (N.S.) 290; 34 L. J. (C.P.) 273.

(9) The original contract was in a letter, as follows:—

"124, Fenchurch Street,
"London, 25th October, 1871.

"Señor Don Francisco Munoz, of Cartagena.

"We hereby confirm the verbal arrangement made with you this morning respecting the produce of such of the Porman iron mines as may be in your hands, viz.:

"We agree to buy from you the whole of the iron ores which you may obtain from these mines within twelve months from this date, at the price of seven shillings and sixpence per English ton, delivered f. o. b. on ships at Porman, upon the conditions that you can obtain freight for all the ore so purchased by us. . . .

"You binding yourself to load the said vessels chartered by you when they arrive on your side, and also such vessels as we may charter. Payment for the ores to be made by your drafts upon us at fourteen days' date if drawn

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chartered, and various payments made up to March, 1872, when the *Trowbridge*, one of the chartered ships, arrived at Cartagena. The payments that had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded; so that had Munoz shipped ore on the *Trowbridge*, he would have been entitled to no payment from the defendants in respect of it. He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. Instead of doing this, he, on the 8th of April, and before any ore was put on board the *Trowbridge*, picked a quarrel with the defendants, telegraphed to them that he would not load the *Trowbridge* on their account, and though they telegraphed to him threatening him if he did not, he loaded the *Trowbridge* and took bills of lading making the shipment to be by one Sabadie, and the cargo deliverable to Sabadie's order. It is agreed he had at the time of shipment no intention to ship for the defendants. In giving these bills of lading the captain was clearly justified, as the charter said he was to sign bills of lading as presented. Sabadie was a sham; the ore was the ore of Munoz. Munoz indorsed Sabadie's name on the bill of lading, and then his own, and then pledged it to the plaintiffs. The question is, whether the plaintiffs or defendants are entitled to the cargo.

If the cargo ever belonged to the defendants, it is certain that Munoz could confer no title unless by estoppel or otherwise, as hereafter mentioned. This is clear on principle, and is shewn by *Ogle* v. *Atkinson*. (1) Did then the ore ever belong to the defendants? Certainly not, till it was paid for. For the agreement was not a sale of specific property, but an agreement to sell all the ore to be produced. Did it become the property of the defendants on being paid for? The contract says it shall. But it seems to me impossible that it can be so. There is nothing to distinguish the ore paid for from that not paid for, certainly there is no evidence that the ore put on the *Trowbridge* was specially

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against B/L., at three months date if drawn against charter; if the latter mode of payment is adopted you are bound to send us with advice of each draft an attested certificate that the quantity of ore drawn for is actually in stock; and that this ore is to be considered our property, &c.

(Signed) "Kreeft, Howard, & Co."

(1) 5 Taunt. 759.

ear-marked as the subject of the cargo for it or any other ship. No certificate in relation to it was given as provided by the contract. It is impossible to suppose that if this ore had been stolen while in the possession of Munoz, though after it was paid for, the loss would have been the defendants', or that the defendants would not have had a right to reject this ore and object to its being loaded, or that Munoz might not have loaded other ore. These considerations seem to shew that no property passed in this ore before it was put on board the ship. Did that cause the property to pass? Now, it is clear that Munoz had no right to put any part of that ore on the ship except for the purpose of its being delivered to the defendants. On the other hand, it is equally clear to me, that had he said to the captain when loading, "I load this on my own account, and not on the defendants," and the captain had taken it on board, the loading, together with the other facts, would not have passed the property. But it does not appear that he said anything till he presented the bill of lading, and then he shewed that he had not loaded for the defendants but for his own purposes. If the property had passed on taking the bill of lading made out as it is, the loading was, in my opinion, nugatory. The captain knew no better, and was justified in giving the bill of lading as he did, but his doing so did not take the property out of the defendants, if in them, any more than it would if the ore had been bought and paid for by the defendants, stored in their yards, and shipped by Munoz as a mere agent: *Ogle* v. *Atkinson.* (1) The question, then, is reduced to this, did the property pass on actual shipment, the shipper having no right to ship except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking, when he does take it, a bill of lading, deliverable otherwise than to the defendants, to whom it ought to have been made deliverable.

If this matter were res integra, there would be strong ground for contending it did. It would be impossible to suppose that Munoz could be heard to say, "I was doing what was right if shipping as your property, wrong if shipping as mine, but it is the latter I did." If Munoz could not say this, neither, it is argued, could any one claiming title under him.

It is true that Munoz had told the defendants that he would not

(1) 5 Taunt. 759.

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ship on their account, but they had equally told him he should, and should ship on no other, and he shipped. Suppose goods not specific were sold to be delivered by the seller into the buyer's cart when sent for, and the seller said, "I shall not put those goods in your cart unless you pay more than the agreed price, and the buyer said, "You shall, and I shall send my cart," and did, and the goods were put in it by the seller, it is clear that the seller could get no more than the agreed price. I know that different considerations may arise as to a cargo, but the question as between Munoz and the defendants is the same.

But the matter is not res integra, though there is no case precisely in point. *Ellershaw* v. *Magniac* (1) certainly is not. There the shipper had shipped a different cargo to what he had agreed to ship; the captain taking it on board knew that. He was bound to tell the shipper to take it out or to give him bills of lading deliverable to him. I am aware that a cargo of linseed was to be shipped, and that some linseed was shipped. But the plaintiff had a right to reject a part cargo. The case may be tested thus. If a bill of lading of the linseed had been given deliverable to the plaintiff he might have refused to receive it. Still that case shews that a shipper rightfully shipping for a buyer, can nevertheless get a bill of lading deliverable to himself. Neither is *Turner* v. *Trustees of the Liverpool Docks* (2) in point. For there the shippers had a right of lien on the goods till they were paid for in the agreed manner. But that case also shews that goods may be put by the seller on the buyer's ship with nothing, as appears, said at the time, and that nevertheless the seller may get a bill of lading deliverable to himself. It does not appear in that case that the shippers at the time of shipment said anything about the form of the bill of lading to be given, or reserved to themselves any right as to it.

Then there is the case of *Falke* v. *Fletcher* (3), in which Willes, J. (p. 409), uses expressions which go to shew that a shipper may ship saying nothing, and then demand a bill of lading in exchange for the mate's receipt in such form as he pleases. *Wait* v. *Baker* (4) is also not in point, because there the vendor had a right of lien. But

(1) 6 Ex. 570, n.
(2) 6 Ex. 543; 20 L. J. (Ex.) 393.
(3) 18 C. B. (N.S.) 400; 34 L. J. (C.P.) 146.
(4) 2 Ex. 1.

Parke, B., said, "The delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried." He said the same thing in *Van Casteel* v. *Booker*. (1) In *Moakes* v. *Nicholson* (2) it was held that retaining the bill of lading, though made out in the buyer's name, prevented the passing of the property. There, however, the vendor had a lien. Mr. Benjamin, on Sales, p. 306, thus sums up the result: "Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried." The cases seem to me to shew that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him.

It seems to me, therefore, that in this case the property never passed to the defendants, and the plaintiffs are entitled to recover. I feel bound by the authorities, which perhaps establish a more convenient state of law than would exist if bills of lading might be got deliverable to one person while the property was in another.

As to the question of estoppel, viz. that the defendants, having authorized the signing of bills of lading as presented, have authorized an act by which Munoz has been able to deceive the plaintiffs, I am of opinion that would not avail the plaintiffs if the property in the ore had passed to the defendants. The defendants no more enabled the commission of a fraud than they would have done if the ore had been their property, never that of Munoz, in their stores, and Munoz only an agent for shipment, and the charter in the present form. What the defendants have done is, supposing the property is theirs, to put it in the possession of Munoz, and so make him appear the owner. But if I hand my watch to a man

(1) 2 Ex. 691; 18 L. J. (Ex.) 9.
(2) 19 C. B. (N.S.) 290; 34 L. J. (C.P.) 273.

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to keep for me, though I in a sense enable him to appear to be the owner, yet if he sells or pledges it, I do not lose my property.

I think judgment should be for the plaintiffs.

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This case differs from *Gabarron* v. *Kreeft* in the following particulars: It is an action on a charterparty by the charterers against the shipowner, for not delivering a cargo to the plaintiffs according to the charterparty. The charterparty did not authorize the captain to sign bills of lading *as presented.* By it the shipowner agreed to deliver the cargo to the plaintiffs. The loading had partly taken place while Munoz was intending to fulfil his contract, but was finished afterwards. The cargo had been specifically drawn against.

If I am right in my opinion in *Gabarron* v. *Kreeft,* the property in this cargo never passed to the plaintiffs. For I think it makes no difference that at the beginning of the loading, Munoz intended to ship for the plaintiffs. As I have said, the act is not complete till the bill of lading is given. Was the shipowner nevertheless bound by the charter to deliver the cargo to the plaintiffs? I think not. I think the charter only means that the cargo shall be delivered to the charterer if he has a right to receive it, and that he had no right to receive this. Then it will be said that the shipowner had no right to take it on board. I think he not only had such right but was bound to do so. I think that if Munoz had said to him, "I will not ship for the plaintiffs, but will ship for myself," and the captain had said, "I will not take the cargo, but sail away in ballast," he would have done wrong. A captain when he cannot get the agreed cargo is bound to take some other cargo, if he can get it, so as to lessen the loss. Suppose Munoz had wholly refused all shipment, and some other owner of ore had offered a shipment; the captain would have been bound to take it, and, had he done so, would not have been bound to deliver it to the plaintiffs.

I think, on the authorities referred to in *Gabarron* v. *Kreeft,* that the captain could not refuse to sign the bill of lading which Munoz required, unless he let Munoz take out the cargo, and that he would have done wrong had he required him to do so. There

is no suggestion in any of the cases cited in *Gabarron* v. *Kreeft* that any action would be maintainable against captain or owner for giving bills of lading to the order of the shipper. Besides, Munoz was the agent of the plaintiffs, and the captain was justified in signing bills of lading as he required.

I think our judgment should be for the defendant.

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CLEASBY, B. The question upon this interpleader is whether the plaintiffs or the defendants are entitled to a cargo of ore put on board a vessel called the *Trowbridge* at Cartagena.

The defendants had agreed to purchase of one Munoz all iron ore, the produce of a certain mine, and it was to be paid for either by bills at fourteen days, if drawn against bills of lading, or by bills at three months from date of charterparty. In this latter case it was provided by the contract of sale that certificates of the quantity being in store should accompany the bills, and that the ore so drawn for was to be considered as the property of the defendants. It is obvious that the bills of exchange in this latter case would not refer to the exact burden of the vessel designated, but to an estimate only of the quantity to be taken on board. Munoz loaded the *Trowbridge* with ore in the name of one Sabadie, and procured bills of lading making the ore deliverable to the order of Sabadie, which Sabadie indorsed to Munoz, and Munoz then indorsed them for a valuable consideration to the plaintiffs. It must be taken that Munoz was not justified in doing this, and that he made the refusal of the defendants to accept two more bills an occasion for breaking his contract, and the question is whether, under the circumstances of the case, the cargo of the *Trowbridge* had ceased to be the property of Munoz when he obtained the bills of lading afterwards indorsed to the plaintiffs. I say had ceased to be the property of Munoz, because it is, I think, clear that although the defendants agreed to buy the whole produce of the mine, the ore did not become the property of the defendants when it was taken for the time to the store, but was at that time the property of Munoz. It must be taken, I think, that by virtue of the payment the defendants had become entitled to a quantity of the ore in store, corresponding with the amount

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of the bills drawn against the charterer of the *Trowbridge*, but it cannot be doubted that this alone would not transfer the property in any particular part, and upon this no authorities need be referred to. And the question becomes whether by any subsequent act of appropriation the property in a particular part has passed?

The question, what is a sufficient appropriation, has formed the subject of many decisions. By referring to *Rohde* v. *Thwaites* (1) and *Brown* v. *Hare* (2), in any work on the subject of sales of personal property, all the authorities will be found.

In my opinion as soon as there was an appropriation, by which I mean an unconditional appropriation, of a part of the stock, that part would become the property of the defendants. Now it is said in the present case that, by the finding of the jury, up to a certain time Munoz was loading under the contract, and afterwards was not doing so. The effect of this would be as to so much as was loaded up to that time, the property would pass, and a question would then arise as to how far Munoz would affect the title of the defendants to what had been appropriated by delivering on board the vessel a quantity of other ore which could not be distinguished.

But in reality, upon all the facts found in this case, and dealing with them subject to the powers conferred upon us to draw inferences, there is nothing to shew that any quantity was delivered on board before the 8th of April, when it is clear that Munoz was not appropriating any as the property of the defendants, but only selecting what he should send by the vessel. There is no proof that part was loaded. The utmost evidence is that of the letter of the 11th of April, the contents of which, having been argued upon on both sides, may be taken as some evidence of the statements contained in it, and thus shewing that the *Trowbridge* and several other vessels were loading on that day. But coupling this with the date of the bill of lading, the 26th of April, I cannot regard this as proof that any quantity was loaded on the 8th of April. And if none was on board before that time, then it appears to me that the mere act of selection from the bulk of a particular part to be placed on board the vessel, is not such an appropriation

(1) 6 B. & C. 388.
(2) 3 H. & N. 484; 27 L. J. (Ex.) 372; affirmed on error, 4 H. & N. 822; 29 L. J. (Ex.) 6.

as to make the contract of purchase operate on it. Because the selection was in the mind of the person selecting, not a selection of a portion of what had been paid for, but of what he alleged was not paid for.

It was further argued that, independently of the intention of Munoz to appropriate the ore loaded to the contract and particular drafts, the fact of loading the ore on board the vessel chartered by the defendants was of itself such an act as vested the property in them. But upon the effect of delivering a cargo contracted for on board the vessel of the vendee, the authorities are too numerous to refer to. I may mention *Turner* v. *Trustees of the Liverpool Docks* (1) as an early one (with *Ellershaw* v. *Magniac* in the note in that case (2)), and *Shepherd* v. *Harrison* (3) as the last. The effect of these is that the delivering of goods contracted for on board a ship when a bill of lading is taken is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply when the ship is the ship of the vendee.

Such would, I think, be the proper conclusion, independently of the clause of the charterparty, that the captain is to sign bills of lading as presented. This does not mean merely as regards price or any particulars of that sort, because it is plain that when the charter was effected it was uncertain whether Munoz would not choose to draw at fourteen days against bills of lading, in which case he might, no doubt, have made the cargo, by the terms of the bills of lading, deliverable to himself. The captain knows nothing about the arrangements between Munoz and the defendants, he only knows that Munoz is the person who is to fulfil the charterparty on behalf of the defendants. Thus the defendants make it obligatory upon the captain to give to Sabadie or Munoz this document of title to property transferable by indorsement, and this, if not an estoppel against the defendants, as between them and the bonâ fide holder of this document of title, very much strengthens the conclusion that Munoz having this power expressly reserved to him, acted throughout with reference to it, as he did in fact exercise it to the last.

(1) 6 Ex. 543; 20 L. J. (Ex.) 393. (2) 6 Ex. 570, n.
(3) Law Rep. 5 H. L. 116.

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For the above reasons I am of opinion that the plaintiffs are entitled to succeed upon this issue.

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This case is not like *Gabarron* v. *Kreeft*, in which the question of property only was involved. It is an action on a charterparty by the freighters against the shipowner. By the charterparty, the defendant was to receive from the factor of the freighters at Cartagena a cargo of ore, and deliver in the Tyne docks to the freighters or assignees. No question arises in the present case upon the pleadings, and the case is to be dealt with entirely on the facts; but as it is a question of contract, it is essential to see what the exact contract is, and it is to deliver to the freighters or assignees. The word "assignees" cannot mean, I think, assignees of the charterparty; but it may mean either assignees of the cargo or assignees of the bill of lading, which is the title to property in the cargo.

I must say I have very great difficulty in dealing with this case, from the scantiness of the materials for any decision. The question relates to the cargo of a vessel called the *Macedonia*, which it appears was chartered as early as the 9th of November, 1871, and drawn against on the 29th of November. It has been noticed that by the arrangement between Munoz and the plaintiffs the cargo might be drawn against either by bills at three months from the date of the charterparty, or at fourteen days from the bills of lading. It might appear from this that bills of lading were not to be taken except when they were drawn against. But that is not the case, the correspondence shews throughout that in cases where the bills had been drawn against the charterparty, bills of lading were still to be taken by Munoz, and forwarded to the plaintiffs. See, for example, the letter of the 29th of November, 1871, in which Munoz says: "We have drawn on you this day a bill for 123*l.*, at 90 days, which we place to your credit on account of cargoes per *Macedonia*, *Nautilus*, and *Messenger*, invoices of which will follow with their respective bills of lading." And as regards the cargo by the *Macedonia*, which we are now considering, and which had been drawn against so early as the 29th of November, we have the following in the letter of the plaintiffs

themselves, dated the 24th of January: "We are expecting bills of lading of *Macedonia* and *Retriever*, &c."

It is true there is nothing to shew that these bills of lading did not make the cargo deliverable to the plaintiffs. But this is not material, because the shipowner or captain knew nothing of the arrangement between Munoz and the plaintiffs, and if there were to be bills of lading, Munoz must be the person to determine in what form they should be, because it is admitted that he might draw in each case against bills of lading, in which case, no doubt, the bills of lading would be deliverable to himself, or he would have no security, and the captain would not ask him why he took the bills of lading deliverable to himself.

The effect of this seems to me to be that the captain *must* look to Munoz to determine how the bills of lading are to make the cargo deliverable, and that he performs his contract by delivering the cargo according to the bills of lading, though by the charter-party the cargo is deliverable to freighters or assignees. If he is addressed to Munoz as the factor of the shipper, and Munoz is to determine whether he will take bills of lading deliverable to himself, the shipper is bound by his act in having the goods made deliverable to himself, and it cannot make any real difference in substance whether by the bills of lading the cargo is made deliverable to Sabadie or to Munoz.

This seems to me a more satisfactory mode of deciding the case then by deciding it on the ground that the plaintiffs did not perform their part of the contract, because their factor did not send a cargo deliverable to the freighters or their assigns, although it really comes to the same thing.

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KELLY, C.B. The question in this case is whether a quantity of iron ore, shipped on board the *Macedonia* by one Munoz is the property of the plaintiffs Kreeft and others, and whether the master was bound to deliver it to them upon its arrival in England, or whether it had passed under the bills of lading to order, signed by the master at the instance of Munoz in favour of one Sabadie, and from whom it passed by indorsement to Gabarron, the plaintiff in the other action. I am of opinion that the ore had become

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the property of the plaintiffs, if not before, at the time when it was shipped on board the *Macedonia;* that the master was bound by the terms of the charterparty to deliver it to the plaintiffs upon the arrival of the ship in the Tyne; and that not having done so, his owner, whom the defendant represents, is liable to this action. The ore was shipped by Munoz at Cartagena, under a contract between him and Kreeft, by which Kreeft had contracted to buy from him the whole of the iron ores which he might obtain from the mines within twelve months from the 25th of October, 1871. And it was expressly agreed that Munoz should load such vessels as should be chartered by Kreeft, payment to be made at fourteen days' date, if drawn for against bills of lading, and at three months' date if drawn against charter. And Munoz to send with advice of each draft an attested certificate that the quantity of ore drawn for was actually in stock; *and that that ore was to be considered the property of Kreeft.*

The *Macedonia* was chartered by Kreeft, and by the charterparty the owner expressly agreed "to proceed to Cartagena, and load from the factor to the freighter (Kreeft) the quantity of iron in question, and therewith to proceed to the Tyne *to discharge at Tyne-dock, and to deliver the same afloat to the "said freighter (Kreeft) or assigns on being paid the agreed freight.*"

The *Macedonia* proceeded to Cartagena, and Munoz having already drawn and Kreeft having accepted drafts exceeding in amount the price of the ore in question, and having taken it out of stock, and so separated it from the bulk of the stock, shipped the quantity of ore in question on board the *Macedonia*, the shipment continuing for several days, and no intimation having been given by Munoz to the master that the ore was otherwise than destined to and shipped for the account of Kreeft, the charterer of the ship. But when the shipment was complete, Munoz fraudulently prevailed upon the master to sign bills of lading for the ore to order, which afterwards passed by indorsement for value to Gabarron.

Under these circumstances I am of opinion that the whole case depends upon the contracts between the parties, that is to say, between Kreeft and Munoz, and Kreeft and the owner of the *Macedonia* respectively, and that Munoz having contracted that

the ore, when drawn for and the drafts accepted, should become the property of Kreeft, it became his property as soon as he had accepted beyond the amount of its price, and it had been separated from the bulk of the stock. But if this were doubtful I am clearly of opinion that it became his property the moment it was put on board the *Macedonia*. The case was contended in argument to be the same as if the plaintiff had purchased and paid for a quantity of merchandize which the seller contracted to deliver into the purchaser's waggon, when he should send for it, and that he had hired the waggon of the defendant, who had contracted to carry it to the plaintiff's warehouse and there deliver it to the plaintiff, but whose servant, the waggoner, having received it into the waggon, had signed a contract to deliver it, and had afterwards, in fact, delivered it to another person. It has been argued that the shipment was made with a view to the bill of lading, and with the intent to take a bill of lading to order, and that the shipment was not complete till the bill of lading was signed. No doubt the shipment and the bill of lading in general constitute but one transaction. But in this case it is to disregard altogether the contracts between the parties, to apply to it this general rule or practice. Here, Munoz had received a copy of the charter, and knew that the vessel had been chartered by the plaintiffs, and that the owner had contracted to receive the ore from him and to deliver it to the plaintiffs upon the ship's arrival in the Tyne. And I hold that it was not competent to Munoz, or to the master, or to both together, to change the property by the wrongful act of Munoz, or the unauthorized acquiescence of the master; the one in demanding, the other in granting the bills of lading. Upon the simple and plain ground, therefore, that under the contract between Kreeft and the shipowner, the master, as the agent of the owner, was bound to deliver the ore, on its arrival in the Tyne, to Kreeft, and that he could not exonerate himself of that obligation by the unauthorized signature of the bills of lading; it appears to me that Kreeft was entitled upon the arrival of the ship in the Tyne to the delivery of the ore, and consequently that the defendant is liable to this action for the non-delivery.

Many cases were cited on the one side and on the other, but it appears to me that none of them has any application to the case

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before the Court, except, indeed, the case of *Ellershaw* v. *Magniac* (1), where the facts were very similar to the present, but with this marked distinction, that there was no such express contract as here—that the property in the goods should vest in the purchaser upon their having been drawn for and the drafts accepted; and further, that a part of the goods only was shipped and the vessel filled up with other goods, for which the purchaser had not contracted, and so that as he was not bound to accept the one and had never contracted for the other, the property in neither had vested in him by the shipment.

On these grounds I am of opinion that the plaintiff Kreeft is entitled to the judgment of the Court.

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This case differs from the last in one point only, but that one is all important. Here, the facts in all other respects being substantially the same, the charterparty of the ship (in this case called the *Trowbridge*) contained these words: "The captain to sign bills of lading as presented." Now, these words appear to me not only to convey an authority to the master, but to impose an obligation upon him, to grant or sign bills of lading in whatever form and to whatever effect he might be required by Munoz to sign them. I think, therefore, that the bills of lading, though a fraud upon Kreeft, were granted and signed under and in strict pursuance of his authority, and having been indorsed for value to the plaintiffs, entitled them to the ore in question, and therefore to the judgment of the Court.

Rules absolute.

Gabarron v. *Kreeft.*

Attorneys for plaintiffs: *Williamson, Hill, & Co., for Ingledew & Daggett, Newcastle-on-Tyne.*

Attorneys for defendants: *Fry & Hudson.*

Kreeft v. *Thompson.*

Attorneys for plaintiffs: *Fry & Hudson.*

Attorneys for defendants: *Williamson, Hill, & Co., for Ingledew & Daggett, Newcastle-on-Tyne.*

(1) 6 Ex. 570, n.

WARNER *v.* THE BRIGHTON AQUARIUM COMPANY.

1875
June 11.

Profanation of the Lord's-day or Sunday—21 *Geo.* 3, *c.* 49, *s.* 1—"*Place of Entertainment or Amusement.*"

The defendants, a company incorporated by an Act of Parliament, are the owners of the Brighton Aquarium, a building which consists of chambers below the level of the ground, and a terrace above. The chief part is used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. The whole is open to the public on Sunday on the payment of 6*d.* each person. An action having been brought against the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open a place of entertainment and amusement on the Lord's-day or Sunday:—

Held, that the aquarium, under the above circumstances, was a place of entertainment and amusement within the statute.

ACTION to recover a penalty of 200*l.* under 21 Geo. 3, c. 49, s. 1.

A case was stated for the opinion of the Court which was substantially the same as that in *Terry* v. *Brighton Aquarium Co.* (1), except that it was stated that the reading-room was used on week-days only, and the statements in *Terry* v. *Brighton Aquarium Co.* (1) as to a band playing sacred music on Sunday evenings, and as to newspapers and illuminated microscopes being provided in the building, for the amusement and entertainment of visitors, were omitted.

The question for the opinion of the Court was, whether under these circumstances the Brighton Aquarium was opened or used for public entertainment or amusement on the Lord's-day contrary to the statute.

Sir John Holker, S.G., and *C. Bowen*, for the plaintiff.
Manisty, Q.C., and *McMillan*, for the defendants.
Sir John Holker, S.G., was not heard in reply.

THE COURT (Kelly, C.B., Bramwell, Cleasby, and Amphlett, BB.) held that, having regard to the decision of the Court of Queen's Bench in *Terry* v. *Brighton Aquarium Co.* (1), it was clear that the aquarium was a place of amusement within the meaning of the Act. The facts, that the band of music had been discon-

(1) Law Rep. 10 Q. B. 306.

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tinued on Sunday and that the reading-room was no longer available except on week-days, might make it not so much a place of amusement as before, but did not prevent it from being a place of amusement within the meaning of the Act.

Judgment for the plaintiff. (1)

Attorneys for plaintiff: *Raven & Hare, for The Solicitor to the Treasury.*

Attorneys for defendants: *Benham & Tindell.*

July 7.

LE MARCHANT *v.* THE COMMISSIONERS OF INLAND REVENUE.

Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 38—*Allowance for Loss of Annuity on Succession—Deprivation of Property on taking Succession.*

The tenant for life and his son the tenant in tail in remainder of real estates, by a disentailing deed in 1869, conveyed the estates to such uses as they should jointly appoint; and by a deed of even date in consideration of the son's intended marriage, appointed the estates to the use of trustees in fee from and after the marriage, subject to a proviso that if the father or son, or any person interested in the equity of redemption, should on a day named in 1870, pay to the trustees 20,000*l.*, with interest at 3*l.* per cent., the trustees should at any time on request reconvey the estates to the uses to which the equity of redemption should then stand settled; and the father covenanted that if the marriage was solemnized he would, so long during his life as the 20,000*l.* or any part should remain due to the trustees on the security of the deed, pay the trustees interest thereon at 3*l.* per cent.; provided that if he should pay the interest half yearly the trustees should not during his life call in the 20,000*l.* or any part; and the deed witnessed that the trustees should stand possessed of the 20,000*l.* upon the trusts declared by the marriage settlement of even date, viz. upon trust for the son for life with the usual trusts over for wife and children.

The marriage was solemnized, and the son received 600*l.* a year as entitled under the deeds until his father's death in 1874, when he became entitled in possession to the estates. In assessing the succession duty in respect of the estates under the Succession Duty Act, 1853, the son claimed an allowance in respect of the value of the annuity of 600*l.*, which he alleged he was "bound to relinquish" or was "deprived of" within s. 38:—

Held, by the majority of the Court (Kelly, C.B., Bramwell, B.), that the case was concluded by *Lord Braybrooke* v. *Attorney General* (9 H. L. C. 150; 31

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(1) By 38 & 39 Vict. c. 80, the Queen has now power to remit any penalty, &c., for an offence under 21 Geo. 3, c. 49.

L. J. (Ex.) 177; and *Commissioners of Inland Revenue* v. *Harrison* (Law Rep. 7 H. L. 1), and that the allowance must be made.

By Cleasby, B., that those decisions were distinguishable, because the 600*l.* a year was payable, not during the joint lives of father and son, but during the father's life, and would have been payable to the son's widow if he had died in his father's lifetime: that there was therefore no deprivation within s. 38, and that no allowance could be made.

THIS was a petition of Sir Henry Denis Le Marchant, Baronet, which contained the following statements:—

1. In January, 1875, the petitioner, in pursuance of the Succession Duty Act, 1853, gave notice to the Commissioners of the Inland Revenue of his succession to certain hereditaments in the county of Surrey to which he became entitled on the death of his father, Sir Denis Le Marchant, who died 30th of October, 1874, and of his liability to pay duty in respect thereof. And the petitioner claimed that in assessing such duty, an allowance of 600*l.* should be made to him by the commissioners in respect of the value of an annuity of 600*l.* per annum which had ceased and determined upon his taking such succession, and of which he was deprived; but the commissioners in assessing the duty payable in respect of the succession, refused the allowance and assessed the duty without making any allowance in respect of the annuity.

2. The petitioner gave due notice to the commissioners of his intention to appeal from their assessment as required by the 50th and other sections of the Act.

3. The circumstances under which the petitioner became entitled to claim the allowance are as follows:—

4. Thomas Le Marchant, by his will dated 25th of May, 1814, gave and devised certain moneys unto trustees upon trust to purchase therewith some freehold estate or estates of inheritance to be held by them upon the uses declared by his will, namely, to the use of his grandnephew the said Sir Denis Le Marchant, for life, with remainder to the use of the first and every other son of Sir Denis, severally and successively and in remainder one after another according to their respective priorities of birth in tail male, with divers remainders over.

5. The testator died in 1816, and his will was duly proved.

6. The moneys were accordingly duly laid out by the trustees and executors of his will in the purchase of certain freehold

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estates in Surrey, which were conveyed and settled to the uses declared in the will.

7. By a disentailing deed bearing date the 6th of September, 1869, and made between (1.) Sir Denis Le Marchant, (2.) the petitioner, and (3.) William Farrer, the estates were conveyed to William Farrer and his heirs, to such uses as Sir Denis and the petitioner should jointly appoint, and in default of such appointment and as far as no such appointment should extend, to the uses of Thomas Le Marchant's will. The disentailing deed was duly enrolled in the High Court of Chancery.

8. By an indenture of even date with the disentailing deed, and made between (1.) Sir Denis and the petitioner, (2.) the Honourable Sophia Strutt, now Sophia Le Marchant, and (3.) certain trustees, in consideration of a marriage shortly to be solemnized between the petitioner and Sophia Le Marchant, Sir Denis and the petitioner, under the powers granted and reserved to them by the above-mentioned disentailing deed, conveyed the estates to the trustees by way of mortgage, to secure a capital sum of 20,000*l.*, and Sir Denis thereby covenanted with the trustees as follows, that is to say:—"That in pursuance of an agreement in that behalf, and in consideration of the said intended marriage, he the said Sir Denis Le Marchant doth hereby, for himself, his heirs, executors, and assigns, covenant with the" trustees, "their executors and administrators, that if the said marriage shall be solemnized, then he the said Denis Le Marchant will so long during his life as the said sum of 20,000*l.*, or any part thereof, shall remain due and owing to the" trustees, "their executors, administrators, or assigns, on the security of these presents, pay unto the" trustees, "or the survivor or survivors of them, or the executors or administrators of such survivor, or their or his assigns, interest on the said principal sum of 20,000*l.*, or so much thereof as for the time being shall remain due, after the rate of 3*l.* for every 100*l.* for the year, such interest to be computed from the day of the solemnization of the said marriage." And it was by the indenture declared that the trustees should stand possessed of the 20,000*l.* and the interest thereon, upon the trusts declared of or concerning the same by an indenture of even date therewith, being the settlement executed on the marriage of the petitioner, namely, upon trust for

the petitioner for life, with the usual trusts over for wife and children.

9. During 1869, and in the lifetime of his father, the petitioner was married to the said Sophia Strutt, and thereupon under the provisions of the deeds of mortgage and of settlement aforesaid became entitled to receive and did thenceforth until his succession to the estates as hereinafter mentioned receive the yearly sum of 600*l.*

10. On the 30th of October, 1874, the petitioner's father died, whereupon the petitioner became entitled in possession and succeeded to the estates, and the annuity of 600*l.* a year payable to him as aforesaid ceased and determined.

11. The petitioner is advised that the refusal of the commissioners to make the allowance claimed is erroneous as being in contravention of the decision in *Commissioners of Inland Revenue* v. *Harrison*, in the House of Lords (1) and the other cases which preceded it.

The petition prayed the Court to reverse the decision of the commissioners, and to order the commissioners in assessing the duties to make to the petitioner the allowance claimed by him in respect of the value of the annuity of 600*l.* per annum, of which he has been so deprived as aforesaid, or such other allowance in respect of the matters aforesaid as to the Court should seem just.

The mortgage deed referred to in paragragh 8 was shewn to the Court during the argument, and the following parts were read:—It recited (inter alia) that "upon the treaty for the said intended marriage it was agreed that the said Sir Denis Le Marchant and Henry Denis Le Marchant" (the petitioner) "should charge the said messuages or tenements, farms, lands, and hereditaments hereinafter described and intended to be hereby appointed with the payment of the sum of 20,000*l.* with interest thereon, and that the said Sir Denis Le Marchant should enter into the covenant hereinafter contained for payment during his life of interest on the said sum of 20,000*l.* after the rate of 3*l.* for every 100*l.* by the year." Then the indenture witnessed that Sir Denis and the petitioner appointed and conveyed the estates to the trustees of the third part

(1) Law Rep. 7 H. L. 1; 43 L. J (Ex.) 138.

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and their heirs, habendum from and after the marriage to the use of the trustees, their heirs and assigns, "subject, nevertheless, to the proviso or agreement hereinafter contained for redemption of the same premises: Provided always and it is hereby agreed and declared, that if the said Sir Denis Le Marchant and Henry Denis Le Marchant, or either of them, or other the person or persons for the time being interested in the equity of redemption of the said premises shall, on the 2nd day of March next pay to the" trustees "or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns the sum of 20,000*l.* with interest for the same after the rate of 3*l.* for every 100*l.* by the year without deduction (except for property or income tax), then the" trustees "or the survivors or survivor of them or the heirs of such survivor, their or his assigns, shall and will at any time thereafter, upon the request of the said Sir Denis Le Marchant and Henry Denis Le Marchant, or either of them, or any other person or persons for the time being interested in the equity of redemption of the said premises, reconvey the said hereditaments and premises hereby assured or intended so to be, to the uses upon the trusts and with and subject to the powers, provisoes, and declarations to, upon, with, and subject to which the equity of redemption of the said hereditaments and premises shall then stand limited and settled."

Then followed the covenant by Sir Denis, set out in paragraph 8, and then this proviso: "Provided always and it is hereby agreed and declared between and by the parties to these presents, that if the said Sir Denis Le Marchant do and shall pay unto the" trustees "or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns, interest for the said sum of 20,000*l.* after the rate of 3*l.* for every 100*l.* by the year by equal half-yearly payments on the days hereinbefore appointed for the payment of interest or within a calendar month afterwards, then and in such case the" trustees "or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns shall not nor will during the life of the said Sir Denis Le Marchant call in the said principal sum of 20,000*l.* or any part thereof."

There were also clauses giving the trustees, for the purpose of

securing the 20,000*l.*, power to sell the estates after notice to pay the moneys due and default in payment, and among other clauses came the declaration of trust referred to in the concluding portion of paragraph 8.

June 5. *Thesiger, Q.C.*, and *A. L. Smith*, for the petitioner. The petitioner, upon his father's death in 1874, became tenant in tail in possession of the estates, and having thus lost the annuity of 600*l.* a year, may be correctly said to be "bound to relinquish or be deprived of other property" of the value of 600*l.* a year within s. 38 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and to be entitled to the allowance provided by that section. (1) Sect. 1 enacts that the term "property" alone shall include real property and personal property; and that the term "personal property" shall include money payable under any engagement. *In re Micklethwaite* (2) decided that where A. covenants to pay B. an annuity during B.'s life, with a proviso that if B. comes into possession of certain estates the covenant shall cease, and B. does come into possession, he loses "property" within ss. 1 and 38, and is entitled to the allowance. Reflections were made on that decision by the Court of Exchequer in *Attorney General* v. *Sibthorp* (3), but it was expressly approved by the House of Lords in *Lord Braybrooke* v. *Attorney General.* (4) That case was followed in *Attorney General* v. *Floyer* (5), and both were expressly approved

(1) Sect. 38 enacts: "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

Sect. 34: "In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the successor may, previously to his possession, have laid out in the substantial repairs or permanent improvement of real property comprised in his succession: Provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value pro tanto of such real property."

(2) 11 Ex. 452; 25 L. J. (Ex.) 19.

(3) 3 H. & N. 424; 28 L. J. (Ex.) 9.

(4) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

(5) 9 H. L. C. 477; 31 L. J. (Ex.) 404.

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and followed in *Commissioners of Inland Revenue* v. *Harrison* (1), where it was held that the fact that the instrument creating the annuity was executed after the passing of the Succession Duty Act made no difference.

Sir R. Baggallay, A. G., and *W. W. Karslake*, for the Crown. No attempt will be made to contest the three last-mentioned decisions; but the present case is quite different.

[CLEASBY, B. If Sir Henry had died in Sir Denis's lifetime, the annuity would still have been payable to Sir Henry's widow, and the estates on Sir Denis's death would have gone to Sir Henry's eldest son, who would have lost nothing.]

Yes, and there lies the distinction between the present and the other cases. To bring it within s. 38, the property lost must by the instrument which gives it be limited to determine at the time when, and for the reason that, the successor comes into possession of the succession. That was so in *Lord Braybrooke* v. *Attorney General* (2), where the tenant for life and his son, the tenant in tail in remainder, executed a deed giving to the son a rent-charge or annuity, payable out of the estates during the father's life. That rent-charge, by virtue of the deed creating it, ceased when the son became tenant in tail in possession. So in *Commissioners of Inland Revenue* v. *Harrison*. (1) In the present case it is a mere accident that the succession to the estates and the ceasing of the annuity occurred together. They would not if Sir Henry had died before Sir Denis. This point was the ratio decidendi in *Lord Advocate* v. *Earl of Glasgow* (3), where the late earl, the heir of entail in possession of certain estates, with the consent of his brother, the present earl and then presumptive heir of entail next in succession, charged the estates with certain incumbrances, and executed bonds of annuity for moneys to be paid by the late to the present earl during their joint lives and to terminate at the death of the first deceaser of them. On the death of the late earl without a son the present earl became heir of entail in possession, and claimed an allowance under s. 38 in respect of the annuities of which he had been deprived. The Court of Session (Lords Ormi-

(1) Law Rep. 7. H. L. 1.
(2) 9 H. L. C. 150; 31 L. J. (Ex.) 177.
(3) Scottish Law Reporter for Feb. 3, 1875, vol. xii. Nos. 13, 14, p. 215.

dale, Neaves, Gifford, and Lord Justice Clerk) held (January 15, 1875), that no allowance could be made, and that s. 38 did not apply, since the succession to the estates and the termination of the annuity, though actually coincident, were not necessarily so—not cause and effect; for if the late earl had left a son the present earl would not have succeeded to the estates, though he would have lost the annuities; or, on the other hand, if the late earl had committed an irritancy and so forfeited the estates, the present earl would have enjoyed during their joint lives both the estates and the annuities. The Scotch judges relied on this as distinguishing the case from the decisions in the House of Lords. The present is not a case of an annuity like those in the House of Lords; it is one of an incumbrance on the estate to the amount of 20,000*l.* The covenant by Sir Denis added nothing; the effect of the proviso not to call in the 20,000*l.* if the interest was paid regularly was to make the covenant for the benefit of Sir Denis, since he was obliged to pay 3*l.* per cent. only. If Sir Denis had paid off the 20,000*l.*, it would have been invested by the trustees upon the trusts of the marriage settlement, perhaps at 5 per cent., so as to produce more than the covenanted 600*l.* a year. Sir Henry would have been the gainer; and this gain would have continued after Sir Denis's death; for Sir Henry would have come into possession of the estates freed from the mortgage, and the income of the 20,000*l.* would have been paid to him for his life and to his widow and children afterwards. Under those circumstances could s. 38 possibly apply?

[BRAMWELL, B. Is not the case this? While his father lives Sir Henry has some property out of his father's estate. After his father's death, Sir Henry has the same property or a substitute, but out of his own estate. Therefore, on succeeding to his own estate he is deprived of or loses the property which he had received out of his father's estate.]

No; the present case is an attempt to evade s. 34, the effect of which is that a successor cannot create a charge on his succession, so as to entitle himself to an allowance under s. 38. A similar attempt was defeated by the decision in *In re Peyton* (1), which

(1) 7 H. & N. 265; 31 L. J. (Ex.) 50.

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governs the present case. This Court will not extend the principle of *Lord Braybrooke's Case.* (1)

A. L. Smith replied.

Cur. adv. vult.

July 7. The following judgments were delivered (2):—

CLEASBY, B. I am quite as much determined as my learned Brothers are to give full effect to the decision of the House of Lords in *Lord Braybrooke* v. *Attorney General* (1), followed by *Attorney General* v. *Floyer* (3), and finally by *Commissioners of Inland Revenue* v. *Harrison* (4); and the only reason for my not coming to the same conclusion is that I do not feel justified in giving what appears to me to be a different character from the real one to the arrangement entered into, so as to make those decisions applicable.

The question is, whether, on the succession of Sir Henry Le Marchant to the estates, there was a deprivation coming within s. 38 of the Succession Act so as to entitle him to a deduction. If, when the property was disentailed, a rent-charge had been charged on the property for the joint lives of himself and his father, the cesser of that rent-charge, upon the death of the father, would have been regarded as a deprivation and the subject of a deduction. To see whether the same reason applies, we must consider what the arrangement was in this case. It seems clear to me that as the annual payment of 600*l.* a year by Sir Denis was only substituted for the charge upon the property in case he paid the annuity regularly, we must consider, not the annuity, but the charge for which it was substituted. In reality, what the settlement made on the marriage required was the security, and not the personal covenant; and the personal covenant was solely in relief of Sir Denis, to prevent the interest of the sum charged—800*l.* or 900*l.*, according to the rate of interest—being paid out of rental so long as he paid the 600*l.* a year.

The effect of the deed is shortly given in paragraph 8 of the petition. The consideration for the deed was the contemplated marriage,

(1) 7 H. L. C. 150; 31 L. J. (Ex.) 177.

(2) That of Cleasby, B., was a written judgment.

(3) 9 H. L. C. 477; 31 L. J. (Ex.) 404.

(4) Law Rep. 7 H. L. 1; 43 L. J. (Ex.) 138.

and the estates were conveyed by way of mortgage to trustees to secure a capital sum of 20,000*l.*, and the trustees were to stand possessed of the principal sum and interest upon the trusts declared in the marriage settlement of the same date. The trusts of the marriage settlement were for Sir Henry during his life, then for his wife if she survived, and then for the children of the marriage. The deed is imperfectly set out, but a copy of it was handed up, and it appeared that the mortgage was to secure 20,000*l.*, with interest thereon, and that it was provided that if Sir Denis paid the trustees regularly interest at the rate of 3 per cent. the trustees would not during his lifetime call in the principal sum of 20,000*l.* And there was a covenant by Sir Denis, so long as the 20,000*l.* was due and owing during his life, to pay to the trustees the interest at the rate of 3 per cent.

Now the question of deprivation or not cannot depend upon whether the interest was paid by Sir Denis to the trustees or received by the trustees on raising the charge, it is in either case to be received by the trustees. Supposing, then, that the 20,000*l.* had been forthwith raised, and interest at the rate of 4 per cent. been paid upon it, what would the trustees be bound to do with it? They must of course pay it to Sir Henry during his life, afterwards to his widow, and so on. This is quite independent of the life of Sir Denis, and must go on just the same until the charge is redeemed. What deprivation, then, is there upon the death of Sir Denis, if a permanent charge continues before and after his death, because the estate which is encumbered with the charge comes to Sir Henry?

The question in the present case is not how the encumbrance is to be considered in valuing the succession, but whether there is a deprivation of the interest or annuity. It would be noticed as regards the annuity, that Sir Denis is to pay it, not during the joint lives, but during his own life; and this shews how different the case is from *Lord Braybrooke's* (1) and the other cases. For, suppose that in this case the son had died before the father, Sir Denis would have gone on paying the annuity to the trustees for the widow, according to his covenant, just as the interest of the charge would have gone to her. In that case the

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177

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estate would have gone to the grandson, Sir Henry being tenant in tail, and in that event things would have gone on after the death of Sir Denis exactly the same as before, the widow receiving the annuity and the grandson enjoying the estate, and nothing approaching to a deprivation could have been suggested on the death of Sir Denis. The death of Sir Henry before or after Sir Denis cannot, I submit, make a difference as to the nature of this present charge, and therefore it appears to me that upon the correct view of the argument in this case there is no deprivation.

No doubt, by substituting for the actual arrangement a different arrangement leading (but only in the events which have happened) to a similar result, ingenious reasons may be given for making out an apparent case of deprivation within the authorities. But I apprehend we ought to look at the arrangement itself to see whether it gives rise to a deprivation. By departing from the actual arrangement, we might in some cases, as in this, come to a conclusion advantageous to the successor; but the substitution of a different arrangement for the actual one, though in a particular event and for a time equivalent, might in other cases act most prejudicially to the subject. I do not find that anything of the sort has been done in any of the decided cases, and I do not feel myself justified in doing so.

One argument used was that during Sir Denis's lifetime Sir Henry got the interest or annuity out of the estate of Sir Denis, and that after his death it came out of his own estate. This reasoning appears to me open to the alternative objection of proving nothing, or being a petitio principii. It arises, I venture to say, from confounding two things, an encumbrance on the property and a deprivation. It proves that the property is encumbered when the property comes to Sir Henry, which is nothing, and then assumes this to be a deprivation. The encumbrance would have entitled Sir Henry to an allowance but for the objection that, being created by himself, it comes within s. 34 of the Act; but this does not make it a deprivation. In my opinion, therefore, there was in this case no deprivation, and the deduction in respect of the annuity ought not to be made.

BRAMWELL, B. I am sorry to say that I cannot agree with my Brother Cleasby's judgment in this case. It seems to me

that the petitioner is entitled to our decision in his favour. I think the case is governed by *Lord Braybrooke* v. *Attorney General.* (1) Whether that case was rightly decided or not, it binds us. For my own part I am willingly bound by it, because in that case the judgment of this Court (2) was founded upon a narrow view of the statute, which undoubtedly would lead, if acted upon, to cases of hardship. I think *Lord Braybrooke's Case* (1) has effectually decided that you must read s. 38 of the Succession Duty Act, as though it had in it, besides the words, "where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property," some such words as these, "cease to enjoy." If that is so, has the petitioner in this case ceased to enjoy the annuity? It may be very easily proved that he has, by asking this question—Does he at present enjoy his estate and 600*l.* a year? He does not: that is quite certain. Therefore, though he has got the estate, he has lost, or been deprived of, or ceased to enjoy the 600*l.* a year. One might almost leave the matter there if I am right in my understanding of what *Lord Braybrooke's Case* (1) has in effect decided. We must remember also that in dealing with this Act of Parliament we must not look at it technically, but we must consider the substance of the matter and regulate our decisions upon that.

But it is suggested that the annuity of 600*l.*, or its equivalent, continues, because it is said that by the covenant of Sir Denis and the arrangement made upon the marriage, 20,000*l.* is to be raised, the interest of which is to be payable to the petitioner, Sir Henry, for his life; and it is alleged that he is enjoying that now, because of the alternative provision, that Sir Denis should not be called upon to find the 20,000*l.*, or to allow it to be raised upon the estate, provided he paid 600*l.* a year. Then it is said, that being so, what the petitioner really enjoyed was the interest, or equivalent of the interest of that 20,000*l.*, and that he is enjoying it still. So he is in a sense, but how? He is enjoying it by first of all paying it to the trustees, and then receiving it back from them, for it comes out of his estate. Therefore, though in one sense he may be said to enjoy the interest of the 20,000*l.*, yet in a substantial sense he cannot be said to do so, because he

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

(2) 5 H. & N. 488; 29 L. J. (Ex.) 282.

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only enjoys it from first of all paying it. That would shew to me that he has been deprived of, or ceased to enjoy, that property under s. 38 of the Succession Duty Act.

Now if the arrangement had been that during the life of Sir Denis, the father, the 600*l.* a year should be paid, not out of the settled estates which have come to Sir Henry, the petitioner, but out of some real estate of the father's which did not come to the petitioner, could there be any doubt that *Lord Braybrooke's Case* (1) would govern the present one? It appears to me clear that it would. Then what is the difference in substance? None, to my mind. The only difference is an immaterial one; that is to say, that the 600*l.* a year during the life of the father was coming out of the estate which afterwards came to the son, instead of coming out of the estate which did not come to the son; but the result is the same, that the 600*l.* a year comes out of the pocket of the father during his life, and it now comes out of the pocket of the son. The consequence is that he is 600*l.* a year poorer than he would have been had that benefit been continued to him. I think, therefore, upon the authority of *Lord Braybrooke's Case* (1), that he has been "bound to relinquish," or has been "deprived of," or ceased to enjoy, the property, to the amount of 600*l.*; and consequently I think our judgment should be for the petitioner.

KELLY, C.B. I entirely concur in the judgment delivered by my Brother Bramwell. The substance of the case is simply this: The petitioner is to receive during the life of his father this annuity or indemnity—or whatever it may be called—this 600*l.* a year. Upon his father's death he ceased to receive it, and it was lost to him altogether. I think it is clearly a case within the principle of these decisions of the House of Lords, of which I need hardly say I entirely approve, but were it otherwise this Court would be bound by them. I therefore agree with my Brother Bramwell that the judgment in this case must be for the petitioner.

Judgment for the petitioner.

Attorneys for petitioner: *Paterson, Snow, & Burney.*
Attorney for the Crown: *Solicitor of Inland Revenue.*

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

THE A'. 'RNEY GENERAL *v.* THE MUTUAL TONTINE WEST- .. INSTER CHAMBERS ASSOCIATION, LIMITED. 1875 *July* 7.

*Inland Revenue—Inhabited House Duty—Dwelling House divided into distinct Tenements—*48 *Geo.* 3, *c.* 55, *sch. B, rules* 6, 14—*Valuation List—Valuation* (*Metropolis*) *Act*, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 45, 76.

The Westminster Chambers in the metropolis belong to an association and consist of several blocks of building. Each block is divided into two ranges by an internal staircase having only one door at the principal or street entrance, and is in its internal arrangement structurally divided into different tenements or suites of rooms, which, like chambers in the Inns of Court, are quite distinct from and have no means of communication with each other, except that each has an open door opening on to the common staircase. The street door is locked at night, and a porter, appointed and removeable by the association, resides in a distinct suite of rooms in the basement of the block, and has a key of and access to each of the suites of rooms for general superintendence, and as the tenant's servant. The association have power by statute to demise or sell any suite separately. Some of the suites have never been let, but most are let as chambers, offices, or residences, to tenants for a term, at yearly rents, payable quarterly, under written agreements, which contain clauses more than usually stringent on the tenants as to repairs and mode of occupation. The association provide gas for the staircases, halls, and passages, and water for the entire building, and pay rates and taxes, charging the tenants higher rents in consequence. The tenants have the right to the services of the porter upon certain terms. In the valuation list prepared under the Valuation (Metropolis) Act, 1869, each suite of rooms is treated as a separate hereditament, the respective tenants thereof being separately assessed to the poor-rate as the occupiers; and the Court of Queen's Bench decided that for the poor-rate the suites were rightly treated as separate hereditaments:—

Held, by the majority of the Court (Bramwell and Cleasby, BB.), that for the purpose of the inhabited house duty, rule 6 of 48 Geo. 3, c. 55, sch. B, applied, and that the association must be assessed as occupiers of each block treated as one dwelling house; and that the respective tenants of the different suites must not be assessed as occupiers of distinct properties under rule 14.

Held, also, that the value of each block was properly represented by the aggregate sum of the values appearing in the valuation list, although, owing to some of the suites being unlet and producing no rent, the valuation list did not correctly represent the annual value to the association.

Contrà, per Kelly, C.B., that for the purpose of the inhabited house duty rule 14 applied, and that the respective tenants of the different suites must be assessed as occupiers of distinct properties.

Affirmed on appeal 10 Q.B.D. 469. C.A.

THIS was a proceeding for the recovery of 548*l.* 17*s.* for duties under the statutes relating to the inhabited house duties; and by consent and under the order of Cleasby, B., dated the 2nd of

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November, 1874, according to 22 & 23 Vict. c. 21, s. 10, the following case was stated:—

1. The defendants object to an assessment to the inhabited house duty made for the year 1871, due the 1st of January, 1872, upon certain premises called the Westminster Chambers, belonging to the defendants, in Westminster, Middlesex, and in the metropolis, as defined by the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67.

2. The Westminster Chambers consist of 7 blocks of building, having 7 principal entrances. Each of these blocks is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance, and each block is in its internal arrangement structurally divided into different tenements or suites of rooms which are quite distinct from each other, like chambers in the Inns of Court; and they are let and occupied, and are in every instance capable of being let and occupied, separately as chambers, offices, or residences. Each tenement or suite has an open door opening on to a staircase common to all, and also an inner private hall or passage, a water-closet, and a lavatory. There is no means of communication between those suites other than the staircase common to all. Nearly all the suites are let and used as offices or chambers for business purposes, and they are locked and unoccupied during the night. A few only of the suites in three of the blocks are used as residences.

3. The outer or street door to each block is kept locked at night, and a porter who is appointed by the association resides in a distinct set of rooms in the basement of each block, and has a key of and access to the suites of rooms in such block in the occupation of the tenants as their servant, and "the regulations" hereinafter referred to, shew more fully the mode in which the porters are appointed and employed.

4. The Westminster Improvement Act, 1853 (16 & 17 Vict. c. 176, s. 69), applies to the association and the property in question, and enacts that where any house erected on land of the commissioners shall be occupied or be intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors or assigns, may, if they shall think fit so to do,

demise or sell any set of apartments separately from the rest of the said house. The association hold the Westminster Chambers by title derived from the commissioners, whose assigns they are. None of the suites of rooms have been sold, but the greater number have been demised for seven, fourteen, or twenty-one years.

5. The association provide gas for the staircases, halls, and passages, and water for the entire buildings, and pay all rates and taxes in respect thereof, charging their tenants higher rents in consequence.

6. Each tenement or suite is held under a written agreement. A copy of the old form of agreement, which has been disused for some time, is set forth in the report of the case of *Reg.* v. *St. George's Union.* (1) The form of agreement, of which a copy, marked A, is appended to this case, and is to form part of it, is the one now in use. (2)

7. Each block is not inserted in the valuation list prepared in pursuance of the Valuation Metropolis Act, 1869, as one hereditament, but each tenement or suite is treated therein as a separate hereditament and assessed accordingly, the name of the tenant of each occupied suite being inserted as the occupier thereof. There are in the 7 blocks 117 of these suites thus separately assessed. The tenants thereof are separately charged and assessed to the poor-rate in conformity to the valuation list.

8. The following extract from the district tax assessment for the year 1871–72, shews in detail the different modes in which the inhabited house duties have by the house tax commissioners been assessed on the premises:—[see next page].

9. The commissioners for the district in assessing the property for 1871 for the inhabited house duty to an amount of duty in the aggregate of 548*l.* 17*s.*, have treated the whole of the buildings (with the exception of the Imperial Bank premises, being part of block No. 1, which, having a separate communication direct with the street, are separately assessed on the bank as occupier to a duty amounting to 11*l.* 16*s.* 3*d.*) as 7 separate inhabited houses, and have assessed the same to the association itself as "occupiers," and not to their tenants whose names appear in the valuation list.

(1) Law Rep. 7 Q. B. 90. (2) Post, p. 312.

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INHABITED HOUSE DUTIES.

Number of Assessment.	Name of street or place and Christian and surnames of occupiers.	Number of House.	Description as to trade, profession, and purposes for which the premises are occupied.	Gross annual value of the premises as fixed by the Valuation List.	Duty payable at 6*d.* in the pound in respect of any dwelling house occupied			Duty payable at 9*d.* in the pound in respect of any dwelling-house not occupied and used for any of the purposes described in the preceding columns.
					By any person in trade who shall expose to sale and sell any goods in any shop or warehouse being part of the same dwelling-house, and in the front and on the ground or basement story thereof.	By a person duly licensed to sell therein by retail, beer, &c.	As a farm-house by a tenant or farm servant and bonâ fide used for the purpose of husbandry only.	
				£				£ s. d.
262	Victoria Street. The Mutual Tontine Association, Limited. G. S. Sidney, Secretary.	7	Westminster Chambers.	2,650				99 7 6
263	,, Nos.	6	House or building let in tenements.	1,349				50 11 9
264	,, ,,	5		2,622				98 6 6
265	,, ,,	4		1,850				69 7 6
266	,, ,,	3		2,742				102 16 6
267	,, ,,	2		1,760				66 0 0
268	,, ,,	1		1,663				62 7 3
				14,636				548 17 0

10. The value upon which the assessment of each block is made is taken from the valuation list, and is the sum of the values inserted there with respect to all the 117 suites in that block. Several of the suites have never been let since the Westminster Chambers were built. Out of the 117 suites only 99 are let.

11. The inhabited house duty is now levied under the authority of 14 & 15 Vict. c. 36, of which s. 2 enacts that all duties imposed by the Act shall be assessed and levied according to the regulations contained in 48 Geo. 3, c. 55, sch. B.

12. The material parts of schedule B. are as follows:—

A schedule of the duties made payable on all inhabited dwelling houses throughout Great Britain, according to the value thereof, and of the offices and lands to be charged therewith:—

Rules for charging the said last-mentioned duties:

Rule 1. The said last-mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house, being of the annual rent of five pounds or upwards, at the respective rates before mentioned, and to be levied on him, her, or them, or on his, her, or their respective executors or administrators, and in like manner, in case of a change in the occupation thereof, as is before directed in respect of the duties on windows or lights.

Rule 4. Every chamber or apartment in any of the Inns of Court, or of Chancery, or in any college or hall in any of the universities of Great Britain, being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof.

Rule 6. Where any house shall be let in different storeys, tenements, lodgings, or landings and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling house, and shall be charged to the said duties.

Rule 7. No dwelling house or other such premises as aforesaid shall be estimated or rated at any less annual value than the rent or value at which the same premises stand charged in the last rate made on or before the time of making the assessment for the relief of the poor in the same parish or place.

Rule 8. In case the said poor-rate should have been made throughout by a pound rate on the full annual value of all the dwelling houses in the same parish or place, then such assessment shall be made according to the said rate and the assessors appointed or to be appointed for the said duties shall, in making their assessments on different dwelling houses in the same parish or place in all such cases as aforesaid, observe the same rule of proportion between the assessment of the duties granted by this Act thereon as shall have been observed in making such poor-rate as to all the premises aforesaid rated in such poor-rate.

Rule 9. In case the said poor-rate shall have been made on any proportionate part of such value, then such assessors shall assess the same at the same sums respectively as they would have been assessed at by virtue of this Act if the

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same had been respectively estimated in such poor-rate at the full value thereof respectively.

Rule 11. In case any house, with the premises aforesaid therewith occupied, shall not be rated in such poor-rate or shall be rated therein together with other property not chargeable to the duties hereby granted, or there shall be no poor-rate in the parish or place where such house is situate, and in every case where the rules before mentioned are not applicable, the said assessors shall make their assessment from the best information they can obtain of the annual value thereof, which in all cases shall be the actual amount of the rent at which the said houses and premises aforesaid respectively are let, or, if not let, the rent which they respectively are worth to be let by the year.

Rule 14. Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same were an entire house, which duty shall be paid by the occupiers thereof respectively.

13. By s. 45 of 32 & 33 Vict. c. 67 (the Valuation (Metropolis) Act, 1869), it is enacted:

That the valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall, for all or any of the purposes in this section mentioned, be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted: that is to say:

(2.) For the purpose of any of the following taxes which become chargeable during the year that the list is in force, namely:

(*a*) The tax on houses levied under the House Tax Act and the Acts therein incorporated or referred to.

By s. 76 it is enacted:

That, where, for the purpose of the Acts relating to the duty on inhabited houses, or to the duties charged under Schedule B of the Income Tax Act, or to the sale of exciseable liquors, it is necessary to make a separate valuation of any hereditament by reason of its not being separately valued in any valuation list, the value of such hereditament shall be ascertained in the same manner as if this Act had not been passed.

14. In 1870, before the Valuation (Metropolis) Act came into operation, the Commissioners of Assessed Taxes submitted, under 48 Geo. 3, c. 55, a case to Keating and Hannen, JJ., asking their opinion whether the assessment of the property of the association to the house duty should be on seven blocks of buildings or on each suite as distinct properties, according to rule 14 of schedule B. The two judges decided that the property in question should be assessed in seven blocks. Such case was drawn by the commissioners, but the representatives of the association were not

consulted upon it, and it does not, in the opinion of the association, sufficiently state the facts.

15. In the course of each year some of the suites in each block are unlet and unoccupied, and consequently the association derive no rent from the same, and the aggregate sum of the values which appear in the valuation list does not therefore represent the annual value of the block to the association.

In three of the blocks, namely, Nos. 2, 3, and 7, one or more tenants of the association reside, so that if each block is a house liable to be assessed at one sum for house duty, such three blocks are in part inhabited. No tenants reside in the other blocks, but all use the same as offices or chambers only.

16. The association, when they found that their tenants were separately charged and assessed to the poor-rate for each suite occupied by them (being 117 in all) appealed, under the provisions of the Valuation (Metropolis) Act, 1869, against the valuation list, on the ground that the 7 blocks were not 117, but 7 rateable hereditaments; but the Court of Queen's Bench decided that each tenement or suite of rooms was a separate rateable hereditament, and that the valuation list rightly treated them as 117 rateable hereditaments: *Reg.* v. *St. George's Union.* (1)

The questions for the Court are—

1st. Whether the property is properly assessed to the inhabited house duty, as 7 dwelling-houses only, on the association as occupiers; or whether each of the 117 suites or sets of chambers, of which the entire buildings consist, should be separately assessed on the tenants thereof respectively.

2ndly. If the Court should be of opinion that the property is properly assessed as 7 separate dwelling-houses for the purpose of assessing the inhabited house duty, then, whether the value of each of the 7 blocks is properly represented by the aggregate sum of the values which appear in the valuation list as those of the separate hereditaments in the occupation of the tenants of the association in that block, or whether the commissioners ought not to make a separate valuation on the association itself of each block under s. 76 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67).

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The Court is to be at liberty to draw inferences of fact.

Judgment to be entered up in accordance with the answers given to the questions.

A. (Copy Form of Agreement.)

An agreement made the day of One thousand eight hundred and Between The Mutual Tontine Westminster Chambers Association (Limited), by their secretary, hereinafter called the lessors, of the one part, and hereinafter called the lessee , of the other part.

The lessors hereby let, and the lessee hereby take , all rooms numbered and being on the floor of the buildings, and numbered of the chambers belonging to the association called The Westminster Chambers, situate in Victoria Street, in the city of Westminster, together with the use of the water-closet and washing-closet attached thereto, and also the use, in common with the other tenants, of the entrance-hall and stairs and lift leading to the same premises, for the term of year , from the day of , One thousand eight hundred and , and so on from year to year, at the yearly rent of , payable by equal quarterly payments on the usual quarter-days, free from all deductions whatsoever, the lessors hereby agreeing to pay all taxes, rates, assessments, and impositions, parliamentary, parochial, or otherwise, charged or to be charged on the premises. And the lessors and lessee hereby mutually agree as follows:—The lessee , executors, administrators, and assigns will not do, or permit to be done, any damage or waste to the premises; and will, at least once in every two months during the term hereby granted, properly clean the windows of and belonging to the said demised premises, and will, as often as occasion requires during the term, repair, maintain, and keep the premises in such repair as that the same shall be at all times suitable and ready for the occupation of a tenant. The lessee will once at least during every period of four years, if the tenancy shall be so long continued, paint in the best manner with two coats of paint, all the inside woodwork of the demised premises which are now painted, and colour all the ceilings of the rooms and passages in a proper manner. And will, at the expiration of the tenancy, leave and deliver up possession of the same in such repair unto the lessors or as they direct; together with all chimney-pieces, stoves, windows, doors, fastenings, partitions, locks, keys, and all other fixtures, matters, and things which, at the time of the entry of the lessee on the premises, shall be found thereon, or which, at any time during the tenancy shall be added to and so fastened upon the premises by the lessee , executors, administrators, or assigns as that the same cannot be removed without damage or injury thereto. The lessee , executors, administrators, and assigns will not without in every case the written consent of the lessors, pull down or alter or in any manner interfere with the construction or arrangement of the premises, or cut, alter, or injure any of the walls, timbers, or floors of the premises, or in any manner deface or disfigure the walls or ceilings thereof, or convert into, or use, or occupy the premises, or any part thereof, as a shop or warehouse, or for any unlawful or immoral purpose, or for any purpose other than purposes proper for residential, professional, or official chambers, or without the previous consent of the lessors affix any board, placard, or notice

upon any external part of the premises, or in any of the windows thereof, or have or deposit any offensive goods or materials on the said premises, or permit any of such things to be done. The lessee , executors, administrators, or assigns will not without such consent assign, underlet, or part with the possession of the premises, or any part thereof, or any interest therein. The lessors, or their agents, shall at all times during the term hereby granted have liberty to enter upon the said premises for the purpose of painting the outside wood and ironwork thereof, and may at all seasonable times enter and view the premises and examine the condition and use made thereof, and give notice of defects, wants of repair, and misuser, all of which shall be amended and corrected within one calendar month after such notice, but nevertheless without prejudice to any other right or remedy in respect thereof, and nothing shall be done or allowed in, upon, or with respect to the premises which may annoy, or tend to the annoyance of, the lessors or of any of the other tenants or occupiers of any part of the Westminster Chambers, or which may injure, or tend to injure, the character thereof as a place for residential, professional, or official chambers. In case of non-payment of the rent within twenty-one days after becoming due, and demand made thereof, or on breach of any of the foregoing stipulations and articles, or on the bankruptcy of the lessee , executors, administrators, or assigns, the lessors may without any previous notice re-enter and resume possession of the premises, and put out all persons therefrom, but without prejudice to any right or remedy for any such non-payment or breach. In witness whereof the parties hereto have set their hands the day and year first above written.

Memorandum. The premises are taken by the lessee subject to the regulations made by the lessors with respect to the duties of the porter, the supply of coal, and other matters for the general convenience of the tenants. These regulations are set forth in the schedule to this agreement, and are to be considered as forming part thereof. The lessors, however, reserve to themselves the right of altering and modifying these regulations from time to time as circumstances may in their judgment render desirable.

The Schedule referred to.

The Regulations.—Memorandum of regulations made by the directors in respect of supply of coals, cleaning rooms, &c.:—

There are seven entrances to the building, and the care of each entrance, and the rooms connected therewith, will be in the charge of a resident porter appointed and removeable by the directors, but who shall be, and act as, the servant of the lessee.

There are duplicate keys to the outer door of every set of chambers, one of which is to be always in the hands of the porter, the other in the personal care of the tenant while the rooms are in use.

The tenants have the right to the general services of the porter within the scope of his general duties, as hereinafter defined.

Tenants have the right to the special services of the porter as hereinafter defined upon the terms hereinafter mentioned.

Coals are to be supplied by the lessors at a charge per measure of 900 cubic inches, fluctuating according to the market price paid; and gas is brought to the entrance of each set of rooms, and may be laid on by the tenants at their own expense if desired.

Tenants are not to have stores of coals in their rooms.

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The general duties of the porter, and which are to be performed free of extra charge to the tenants, are as follows:

To be constantly in attendance in the section of the building committed to his charge, either by himself, or in his temporary absence, by some trustworthy assistant.

To cleanse every morning before 9 o'clock a.m. the general stairs, passages, lifts, and entrances attached to the section, and to attend to the lighting and extinguishing of the gas therein.

To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants for safe custody on their leaving for the night.

To attend to the regular and proper supply of coals to the several apartments.

The special services of the porter which he is bound to render to the several tenants, if required, at a charge of 1*s.* 6*d.* per week for each room, comprise the cleansing and arrangement of each such room, and the lighting of the several fires whenever required.

Any extra services required of the porter by the tenants, and which are not inconsistent with his general duties, are to be subjects of special arrangement between them.

Any services, whether special or extra, so rendered by the porter, will be rendered as the servant of the tenant, and for which, or the consequences whereof, the association will not be responsible.

June 3. *Sir R. Baggallay, A.G.* (*Pinder* with him), for the Crown, relied on rule 6 of schedule B of 48 Geo. 3, c. 55, and contended: 1. That the entire buildings of the Westminster Chambers are properly assessed to the inhabitated house duty as 7 separate dwelling-houses in accordance with the decision of Keating and Hannen, JJ., in 1870. 2. That s. 45 of the Valuation (Metropolis) Act, 1869, having declared the valuation list in force for the time being to be conclusive evidence of the annual value of the several hereditaments included therein for the purpose of the Inhabited House Duty Acts, the commissioners were right in taking the aggregate annual value of the 117 hereditaments, as the aggregate annual value of the 7 blocks, and charging the association with duty accordingly. 3. That in the event of its being held that no one of the 7 blocks is valued in the valuation list as a separate hereditament within the meaning of s. 76 of the Metropolis Valuation Act, 1869, the property in question is still to be assessed as 7 blocks, and the value to be ascertained by the commissioners as if that Act had not passed.

Giffard, Q.C. (*Poland* with him), for the defendants, contended: 1. That the property is not properly assessed to the Inhabited

House Duty as 7 dwelling houses only. 2. That each of the 117 sets of chambers is a separate and distinct house, and ought if inhabited to be separately assessed in accordance with the decision of the Court of Queen's Bench in 1870. 3. That the property comes under rule 14, and not under rule 6, of schedule B of 48 Geo. 3, c. 55. 4. That the valuation list prepared under 32 & 33 Vict. c. 67, which values and assesses each set of chambers separately, and treats the tenants of the association as the occupiers thereof respectively, is binding upon the commissioners of assessed taxes. 5. That if the property is properly assessed as 7 houses for house duty the value of each of the 7 houses is not properly represented by the aggregate sum of the values which appear in the valuation list as those of the separate hereditaments in each house, and that the commissioners ought to make a separate valuation of each house under s. 76 of 32 & 33 Vict. c. 67.

Cur. adv. vult.

July 7. The following judgments were delivered:—

CLEASBY, B. The question is, what is the position of these houses in applying the statute 48 Geo. 3, c. 55, and whether the case comes within rule 6 or rule 14 in schedule B? It must come within one or the other, and in that way it has been argued. We are to construe 48 Geo. 3, c. 55. No assistance can be derived from the statute 32 & 33 Vict. c. 67. It would lead to monstrous conclusions if there was to be one construction of the statute from 1808 to 1869 (sixty-one years), and the construction was to be changed by an argument derived from the language of an Act then passed alio intuitu, and which provides for the mode of getting at the amount of assessment. In reality this question has arisen in consequence of a difficulty in applying all the provisions of the latter Act, but that is no reason for varying the construction of the former Act, and the difficulty could be removed by legislation.

The question is, whether the several tenements or suites of rooms in each block are to be regarded as let to tenants so as to come within rule 6, or as being distinct properties so as to come within rule 14? I do not think that rule 4 affords the least assistance. It provides expressly for a defined exceptional case,

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and has no application direct or indirect to other cases. In the particular cases of chambers at the inns of court or the universities each set of chambers is made one house, and the reason is that there is nothing whatever to give them collectively the character of one house, no common outer door, no person residing for common purposes, and no element of common occupancy.

In the present case each block undoubtedly forms one house, and this was not disputed, but the question was, is it to be assessed under rule 6 or rule 14? This makes the decision in *Reg.* v. *St. George's Union* (1) not applicable. The only question there was, whether there was a separate possession of the Chambers under the agreements: not whether they were let.

I find it impossible to read the terms of the agreements of demise and the regulations without coming to the clear conclusion that in this case the sets of chambers are let in different tenements within rule 6, and are not distinct properties within rule 14. We find more than the usual clauses of tenancy: the tenants cannot commit waste; they cannot assign without licence; they must keep the premises in repair; they cannot in any manner interfere with the construction or arrangement of the premises, they can only use them for specified purposes, viz. office or residential; the landlords may enter and paint the outside, and in case of non-payment of rent or breach of any of the covenants the landlords may re-enter and avoid the lease.

This appears to me to be an unheard-of sort of ownership or distinct property where persons have none of the ordinary rights of ownership, and by the memorandum the lessees are bound by further stringent regulations, which the lessors and, as I should say, the owners, reserve to themselves the right of varying. It is quite a common thing in London for different persons to be the owners of the different stories or flats of one house; it is to that state of things, and not such a case as the present, that the 14th rule applies. For the above reasons I am of opinion that the whole property is properly assessed as 7 dwelling houses.

I also think it follows that the value of each block is accurately represented by the aggregate sum of the values which appear in the valuation list. I should have been glad to escape from this

(1) Law Rep. 7 Q. B. 90.

conclusion by resorting to s. 76 of 32 & 33 Vict. c. 67, but it appeared upon the argument that this was impossible. This inevitable conclusion causes an injustice which ought to be corrected. I think judgment should be given for the Crown.

BRAMWELL, B. I am of opinion our judgment should be for the Crown. The 48 Geo. 3, c. 55, imposes a duty on inhabited houses. Had it given no rules on the subject, the question would have been whether these blocks, constructed and used as they are, were each one or many "houses" within the Act. To determine this it would be perfectly relevant to inquire what the law had held to be a house in cases of burglary and others; and it may be—I offer no opinion—that possibly each of the separate apartments in each of these blocks would have been held to be a separate house. But the statute has given its own arbitrary definition of what shall and what shall not be a house for the purposes of charging the duty. By rule 1 it enacts the charge shall be on the occupier. By rule 6, when the house is let in different stories, tenements, lodgings, or landings, and inhabited by two or more, the landlord shall be deemed the occupier; but the duties may be levied on any occupier where the landlord is not in the district. I think this includes the present case. Mr. Giffard argues that it applies to cases of lodgers only, persons who have no possession of the rooms as against the landlord, mere licensees who could maintain no action of trespass against him if he came into their rooms. Very unfortunate language has been used, as he admits, if this is so. Rule 6 speaks of a "tenement" "let." I think it does not apply to such cases of lodgers, but to such as the present. I should think so if rule 14 did not exist. But that rule, I think, makes the matter plain. It says that where there is one house divided into different tenements, being distinct properties, they shall be separately assessed. That does not mean distinct properties in the occupier, for that would be true of lodgings. I am not sure it means having distinct owners: it may or may not mean being distinct as one field might be from another. This at least is manifest, that rule 6 supposes there will be one owner or landlord, and rule 14 supposes there may be several.

It is asked why chambers in the inns of court are separately

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assessable if these are not. This is an unfortunate question; because, if rule 6 includes this case, what need was there of rule 4? But the question may be answered. The legislature foresaw trouble and risk to the revenue if each occupier of part of a house was as a rule to be separately charged, and accordingly said that, in that case, the owner of the house should be. It made an exception of chambers in the inns of court because it foresaw there was no such danger as to them, and they might be safely excepted, and it was convenient they should be.

It is said that here the defendants may sell part of the house. I really do not see the bearing of that. They have not so sold. When they do, I think I can tell what ought to be done. But this power to sell part of a house belongs to every owner.

It is said, to hold as I do will be a hardship on the defendants; that one set of chambers may be occupied, the rest empty, and the defendants liable to duty on the whole block. No doubt this is a hardship; but it may well be an intentional hardship, for the security of the revenue. It may well be the legislature determined that, unless a house was uninhabited, it should pay on the whole, and without inquiry how much was empty. This hardship clearly would exist in the case of a house let in lodgings. In support of this opinion is that of Keating and Hannen, JJ., and the intimation of a similar opinion in the Queen's Bench.

As to the second point, I am also of opinion in favour of the Crown. The statute 32 & 33 Vict. c. 67 provides that a general assessment should be made applicable to all rates and taxes. Such an assessment has been made, and must be acted on. For the purpose of the poor-rate it was necessary to assess each set of chambers separately; for the purpose of this tax it is necessary to add up the sums so separately assessed. It is said this is hard, for that a less value will be charged to the poor-rate than to the house-tax. That is the same objection of hardship that I have before disposed of. Uninhabited parts of a house are included in the value when there are inhabited parts. The house is assessed on its letting value.

KELLY, C.B. The real and substantial question in this case is in effect whether each suite of rooms, or set of chambers, in these

houses or buildings is to be treated as a separate property, and to be assessed to the house-tax in respect of its annual value, that is to say, its rateable value as distinguished from its gross annual value, or whether the whole block or house is to be assessed as one tenement. It cannot be denied that the case may be brought within the words of either the 6th rule or the 14th in 48 Geo. 3, c. 55, sch. B; but when we look carefully and critically to the language of these two rules, and consider it with reference to the character or description of these tenements, the language of the 6th rule will be found to be applicable rather to lodgings than to chambers, while the language of the 14th seems to point rather to chambers than to lodgings. The words in the 6th rule are "different stories, tenements, lodgings, or landings." In the 14th the words are, "different tenements being distinct properties;" the word "tenements" therefore being common to both rules.

What, then, is the description given in the case of the sets of rooms in question? They are described expressly as "different" tenements or sets of rooms, which are quite distinct from each other, like chambers in the inns of court, and they are let and are occupied, and are in every instance capable of being let and occupied separately as chambers, offices, or residences; each has an open door opening on to a staircase common to all, and also an inner private hall or passage," and other conveniences. "There is no means of communication between these tenements or suites of rooms other than a staircase common to all; nearly all are let and used as offices or chambers for business purposes, and are locked and unoccupied during the night. A few only are used as residences."

Now every word of this description from beginning to end is strictly applicable to and indeed identical with the sets of chambers in the inns of court, and we find by the 4th rule that these chambers in the inns of court are charged as entire houses or separate properties. Why, then, should the legislature have treated the chambers in the inns of court as separate properties, and not have dealt in the same way with the chambers in the buildings in question, which are in character and description identical with those of the inns of court? But when we find that, by the Westminster Improvement Act, the commissioners may not

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only demise, but actually sell any of these sets of apartments separately from the rest of the house, how can it be said that they are not in every respect separate properties, whether they happen to have been let or remain unlet, or have been sold out and out and become the property of other proprietors? The nature and description of these properties, and whether they are to be deemed lodgings, or in the nature of lodgings, under the 6th rule, or tenements being distinct properties under the 14th, surely cannot depend upon the accident whether they are let or unlet, or are actually sol

But the mode in which the assessment in this case has been made seems to me conclusive that the legislature intended them to be deemed separate properties, and that the greatest injustice would be done, and indeed has been done, by the assessment in question, if each block with all the sets of chambers within it is to be deemed for the purpose of the assessment a single property. For it appears when we look to the assessment itself, each set of chambers is set down separately with its gross value set against it in another column, and the gross annual value of those which are unlet is apparently the same as that of those which are actually let and occupied by tenants, and the association or company are taxed or assessed, not in respect of what is the real value to them, that is, the net annual value of the aggregate of all those sets of chambers which are actually let and yield to them each a substantial rent, but in respect of the aggregate of the whole number of these sets of chambers, those which are unlet and yield no rent at all at the same amount or ratio as those which are let to tenants who pay to the association a rent. The consequence is, that they are actually charged with the duties, the amount of which is computed at the estimated net value of each tenement, and have therefore to pay the same amount of duty in respect of all that are unlet, and which are therefore of no annual value to them at all, as for the others which yield each an annual rent. Hence, supposing that one of these blocks contains twenty sets of chambers, ten of which are let for 120*l.* a year each, the gross rental being 120*l.*, and the rateable or net rental being 100*l.* a year, and the ten remaining sets of chambers are unlet and yield during the whole year no rental at all, the association are taxed in respect of

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the net or rateable annual amount of 2000*l.* a year, whereas the real or actual net rental amounts to but 1000*l.* a year: in other words, they pay a tax upon 2000*l.* for property from which they derive only 1000*l.* per annum. We have only to suppose the case of one single set of chambers, and no more, being let at 120*l.* a year, and nineteen sets of chambers unlet and so yielding no rent at all, and if the assessment were made out as the assessment is in the present case, the association would be taxed in respect of 2000*l.* a year, whereas they would derive only 100*l.* a year from the property. This cannot, I think, have been the intention of the legislature.

I am therefore of opinion that these sets of chambers should be deemed separate properties within the 14th rule, and that the company should be assessed upon the real or actual net or rateable value of each set of chambers, as well as for the apartments, whatever they may be, which are occupied by their servant described in the agreements and memoranda as the resident porter. The Crown will thus be entitled to an amount of duties computed upon the real and actual value of the property taxed; whereas, upon the construction contended for on the part of the Crown, I see no escape from the consequences which I have pointed out, that if a tenth or a twentieth of the whole of the block and no more were let and yielded a rent, the Crown would levy, and the association would be liable to pay, a tax computed upon ten or twenty times the real value of the property. It may be said that this error in the amount of the assessment may be corrected by a different mode of valuation, and this is true; but whatever process of valuation is resorted to, if the construction put upon the rules be wrong, the tax is imposed upon the wrong persons, inasmuch as, if these are separate properties within the 14th rule, the occupiers and not the owners are liable to the duties.

It appears to me also that, as these sets of chambers, whether merely let or actually sold, are occupied in all respects as distinct properties separate from and not in any way connected with each other, exactly as the chambers in the Inns of Court, it would be an anomalous and inconsistent mode of taxation to impose the tax which is universally considered a tenant's tax, not upon the occupier, but the owner.

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I do not refer to the decision of the two learned judges relied upon by the Crown, because it is unaccompanied by any reasons and unexplained by anything to be found in the report. Nor do I rely upon the case in the Queen's Bench, because it is decided upon a different Act of Parliament, though it is impossible to deny that there is much in the language of all the judges tending to support the view which I have taken of this case.

Judgment for the Crown.

Attorney for the Crown: *Solicitor of Inland Revenue.*
Attorneys for defendants: *Burchells.*

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RUSBY, SURVEYOR OF TAXES, APPELLANT; NEWSON, RESPONDENT.

Inland Revenue—Inhabited House Duties—Exemption in Favour of Buildings occupied for Trade only—Parts of Buildings occupied for Trade—57 Geo. 3, c. 25, s. 1—32 & 33 Vict. c. 14, s. 11.

The premises known as Weaver's Hall, in the city of London, were occupied by accountants, solicitors and scriveners, merchants, a wine shipper, and a short-hand writer, all of whom used their respective rooms as offices, and by the house-keeper and his family who resided in the top story rent free. The premises having been assessed to the inhabited house duty, the commissioners discharged the assessment on the ground that the premises were entitled to the exemption granted by 32 & 33 Vict. c. 14, s. 11, since the greater portion of them was occupied for the purposes of trade:—

Held, on appeal, that the premises were not exempt on that ground.

Held, also, by Bramwell and Cleasby, BB., that in assessing the premises no abatement could be made, under 32 & 33 Vict. c. 14, s. 11, in respect of those parts which were occupied for the purposes of trade only.

CASE stated for the opinion of the Court, under Part 3 of 37 & 38 Vict. c. 16, s. 9.

At a meeting of the commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties for the city of London, held on the 8th of October, 1874, for the purpose of hearing appeals, Newson, the respondent (1), appealed against an assessment to the inhabited house duties for the year ending the 5th of April, 1873, upon the premises known as the Weaver's Hall, No. 70, Basinghall Street,

(1) Newson's interest in the premises was not stated.

in the ward of Bassishaw, and contended that the premises were exempt under 32 & 33 Vict. c. 14, s. 11, upon the ground that they were occupied as offices and counting-houses for merchants and professional men, except the two rooms occupied by the housekeeper and his family, who lived on the premises solely for the protection thereof.

The premises are occupied by four accountants (1), all of whom use the rooms they respectively occupy as offices, and by the housekeeper, his wife and two children, and a servant, who occupy two rooms on the top story as a residence rent free. The housekeeper and his wife are employed by the various occupiers to clean the offices, for which they are remunerated by them.

Rusby, the surveyor, contended that as the premises were partially occupied by solicitors and other professional men, they were not used solely for trade, and were therefore liable to inhabited house duty. He also referred the commissioners to the Judges' case, 2848, respecting the assessment on the same premises for the year 1869, ending April, 1870, when they were held to be liable, and the appellant admitted that the facts of the case in the years 1869–1870, and 1872–1873, were identical.

The commissioners discharged the assessment, on the ground that the greater portion of the premises were occupied for the purposes of trade, whereupon the surveyor for the Crown declared his dissatisfaction with their decision, and duly required them to state and sign a case for the opinion of this Court, which they accordingly did.

Sir R. Baggallay, A.G. (*Pinder* with him), for the appellant. The duties were imposed by 48 Geo. 3, c. 55, schedule B, and 14 & 15 Vict. c. 36, s. 2. An exemption was granted by 57 Geo. 3, c. 25, s. 1 (2), and that exemption was extended by 32 & 33 Vict.

(1) As to this see pp. 324, 326.

(2) 57 Geo. 3, c. 25, s. 1, after reciting that duties on inhabited houses were granted by 48 Geo. 3, c. 55, sch. B, says:—"And whereas it is become usual in cities and large towns and other places for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime only for the purposes of such trades respectively which have been

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c. 14, s. 11. To bring himself within s. 11, the respondent must shew that the whole of the house was occupied for trade only, or "as a warehouse," &c., and he cannot do that, for it is impossible to contend that attorneys or short-hand writers carry on a "trade." In the case of *The Edinburgh Life Assurance Company* the Court of Exchequer in Scotland decided, on February 2, 1875, that an Assurance Company does not occupy "for the purpose of trade," within 32 & 33 Vict. c. 14, s. 11. It being then clear that part of Weaver's Hall is not so occupied, the Crown is entitled to judgment.

[After some discussion, *Finlay*, for the respondent, admitted that the whole of Weaver's Hall was not occupied for "trade" only, but desired to argue that, in assessing the whole, an abatement ought to be made in respect of such parts as were occupied for trade only, or as a warehouse, &c. *Sir R. Baggallay* agreed

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charged with the said recited duties, although no person shall inhabit or dwell therein in the night-time, and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein mentioned, Be it therefore enacted . . . . that from and after the 5th day of April, 1817, on due proof made in the manner herein directed to the satisfaction of the respective commissioners acting in the execution of the said recited Act, that any person or any number of persons in partnership together respectively occupy a tenement or building, or part of a tenement or building, which shall have previously been occupied for the purpose of residence wholly, as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein, except in the daytime only, for the purpose of such trade, such person, or each of such persons in partnership, respectively residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commissioners, according to the provisions of this Act, to discharge the assessment made for that year in respect of such tenement or building which shall be so used for the purposes of trade, or so employed as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, anything in the said Act to the contrary notwithstanding."

32 & 33 Vict. c. 14, s. 11, enacts that "from and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."

that this question should be decided by the Court, though it was not specifically raised by the case.]

Finlay (*Day, Q.C.*, with him), for the respondent. It is conceded that the building is liable to be assessed for some amount of duty; but it is contended, first, the assessment is wrong, because the parts occupied for other purposes than trade ought to have been separately assessed under 48 Geo. 3, c. 55, schedule B, rule 14, as has been here contended this day in *Attorney General* v. *Mutual Tontine Westminster Chambers Association, Limited.* (1)

[BRAMWELL, B. You cannot argue that point; it is not raised by the case.].

Then, secondly, the assessment is wrong, because no abatement is allowed for those parts which are occupied for the purposes of trade only. It would be monstrous if, because out of twenty-one persons who occupy Weaver's Hall, two or three occupy for other purposes than trade, the whole building should be assessed upon its full value. Such a construction gives no meaning to the words "part of a tenement," in 32 & 33 Vict. c. 14, s. 11. That Act was designed to extend, not to contract the exemption granted by 57 Geo. 3, c. 25, s. 1, which enacts that on proof that any person occupies a tenement or building, or part of a tenement or building, "the commissioners may discharge the assessment in respect of such tenement or building." There is nothing in either statute implying that, in order to claim the exemption, the "part of a building" must be separately assessed.

KELLY, C.B. It appears to me that this case does not raise the question whether some portion of Weaver's Hall, which has been assessed to this tax, is not by law exempted from assessment; and even if it be supposed that it is raised, still there is no statement in the case which enables me to determine whether the assessment now complained of is in respect of the value or rental of that portion which is so exempted from assessment, or only in respect of the value or rental of the portion which is undoubtedly liable to assessment. Under these circumstances, and lamenting much that the case has come in such a form, I am of opinion that, as it is perfectly clear that this building is liable to some assessment—

(1) Ante, p. 305.

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whether for the entire amount of the assessment or some part I cannot say—I am content to give judgment for the Crown.

BRAMWELL, B. I really think that this case states every necessary fact, and raises every question on which it is necessary for us to express an opinion. It does not raise the point which Mr. Finlay would like to have argued, which is, that there should be a separate assessment upon each of these merchants, attorneys, short-hand writers, and others, and it ought not to raise it, because that is an after-thought; but the real question that it does raise is that on which Mr. Finlay has in fact admitted that he cannot maintain his contention, viz. the question whether the house is used only for the purposes of trade, or any other of the things mentioned in the Act. He admits that the attorney and the short-hand writer use their chambers for purposes other than trade. Then the house is not used for purposes of trade only.

Then can he make any use of this expression in 32 & 33 Vict. c. 14, s. 11, "Any tenement or part of a tenement occupied as a house for the purposes of trade only?" Mr. Finlay suggests that he can, in this wise: that these words, when coupled with the following words, "shall be exempt from inhabited house duties," can only be explained by supposing that the house is to be assessed by the commissioners, with an abatement for that part which is occupied for the purposes of trade. That is what I understand to be the argument briefly put. I think it is erroneous and indefensible. I think that in truth this Act must be read as though the words, "or part of a tenement," were not there. I think they make no alteration in the effect of the Act.

Of course you cannot read these words, "or part of a tenement," without those words which immediately follow, "occupied as a house for the purposes of trade only." It is to be part of a tenement occupied as a house, and that means a part of a tenement which is separately assessable to the house duty, which would come under rule 14 of 48 Geo. 3, c. 55, schedule B, or which in some way or another would be separately assessable. And I am fortified in this conclusion by the words at the end of the section: "although a servant or other person may dwell in such tenement, or part of a tenement, for the protection thereof." If that were to

be read as Mr. Finlay would have us read it, it would read thus: "any room in a house used for purposes of trade only shall be exempt from inhabited house duties, although a person may dwell in that room for the protection thereof." That clearly was not the intention. The intention was to exempt a house, or a separately assessable tenement, occupied as a house for the purposes of trade only, although somebody slept in it.

I think one can find a justification for this conclusion in 57 Geo. 3, c. 25. That Act begins by reciting what would be very favourable to Mr. Finlay's argument, if you looked at that alone. It recites in s. 1, that it has become very customary for people either separately or in partnership, "to occupy a dwelling house or dwelling houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime only." Surely that recital would comprehend a case where a man had a dwelling house in one place and a room in another house, not separately assessable, for the purpose of his trade. But we must see how it goes on: "and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings as are or shall be solely employed for the purposes herein mentioned. Be it therefore enacted . . . that from and after the 5th of April, 1817, on due proof made . . . that any person or any number of persons in partnership together respectively, occupy a tenement or building, or part of a tenement or building" (still the same words are used) "which shall have previously been occupied for the purpose of residence wholly, as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein except in the daytime only for the purpose of such trade, such person, or each of such persons in partnership respectively, residing in a separate and distinct dwelling house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commissioners according to the provisions of this Act to discharge the assessment made for that year in respect

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of "—what?—"in respect of such tenement or building," the words "part of a tenement," being there dropped. So that it is clear that in this Act the words "part of a tenement" really are equivalent to "a tenement," and it is intended to meet such a case as one which comes within rule 14 of 48 Geo. 3, c. 55, sch. B, and to discharge it. The second section deals with the subject, but I think the words "part of a tenement" do not occur again.

If it is said that our construction is harsh; possibly in one sense it is, but in another sense it clearly is not. The legislature had said originally, that all inhabited houses should be subject to the duty, and it was held—properly, no doubt—that a house which was not occupied at night, but was occupied in the daytime for the purposes of trade, was an inhabited house and subject to duty. Very likely it was pointed out that that was in truth taxing the instruments of trade, and perhaps was as injudicious as a tax upon machinery, or tools, or other means by which trade was carried on; and thereupon the legislature thought that it was reasonable to exempt buildings which were solely used for purposes of trade and for the other purposes mentioned. But, at the same time, they did not exempt parts of buildings that were used for such purposes where other parts were not so used, because they could not go into nice distinctions as to the loss of revenue that might be sustained if the question could be raised as to one part of the house being used as a dwelling-house and other parts for the purposes of trade only. Then 32 & 33 Vict. c. 14, s. 11, determined upon a further liberality to persons carrying on trade, and said that what had before been true of a house where nobody dwelt at night should be true of it although persons for its protection dwelt and slept there. Therefore in one sense there is no hardship or injustice in the terms of s. 11; it is simply extending a boon which had been conferred before.

It may be expedient in such a case as this that the legislature should say that in assessing a house partly used for the purposes of trade and partly used for other purposes, the commissioners should make allowance for the value of that part of the house which was used for the purposes of trade only. I do not say that that would not be a very reasonable thing. The Attorney General seems to

think it would be, and I confess I rather think so too, provided there was no danger to the revenue. Whether there would be or not, I cannot say; but we have got nothing to do with such considerations as those of hardship, except this, that no doubt when a case of hardship is pointed out in a statute it makes the construction which leads to it more improbable than if it led to a reasonable and just condition of things. But in my mind the construction of this statute is plain; and the Crown is entitled to judgment, that Weavers' Hall should be assessed to its full value as a house, without any abatement in respect of those parts that are occupied for the purposes of trade only.

CLEASBY, B. I am of the same opinion. The facts here are precisely the same as in the case No. 2848, and the question is the same; but the commissioners thought proper, because the greater part of the building is occupied for the purposes of trade, to make that a reason for exemption. They were not justified in doing that.

Upon the case generally, it appears to me tolerably clear that the exemption does not apply, except where it applies to the subject-matter of assessment. There is one part of 57 Geo. 3, c. 25, s. 1, on which my Brother Bramwell, perhaps, did not dwell as much as it deserves. After the recital that a person may dwell in one house and at the same time occupy "one or more separate and distinct tenements or buildings, or parts of tenements or buildings for the purposes of trade," &c., come the words which I think so important here,—"which have been charged with the said recited duties." I can only read these words as meaning that parts of tenements so occupied for the purposes of trade have been charged with the said recited duties, because it goes on, "although no person shall inhabit or dwell therein in the night time." In what? In the part of a tenement. Of course the very words point to the fact that although no person dwelt therein in the night time, still the part had been charged. The whole of this section seems to point clearly to this, that whereas formerly the exemption had only been where no person dwelt therein during the night time, the exemption is to be carried further. It shall make no difference whether a person does dwell and sleep therein at night time, pro-

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vided the occupation be such as is mentioned. I think that "tenement" and "part of a tenement" have the same meaning, and therefore that the decision of the commissioners was wrong.

Judgment for the appellant.

Attorney for the Crown: *Solicitor of Inland Revenue.*
Attorneys for respondent: *Flower & Nussey.*

June 24.

PATTINSON *v.* LUCKLEY.

Contract—Alteration of Written Contract in material Part—Erasure in Written Contract—Action on a quantum meruit.

1 QBD. 286

The plaintiff was employed by the defendant to erect buildings on the defendant's land upon written conditions, which, after being signed, were kept on the defendant's behalf by his architect. One of the conditions made the architect's certificate a condition precedent to the right to payment. The plaintiff having been paid for all the works for which the architect had certified, sued upon a quantum meruit in respect of works for which no certificate had been given. The defendant, in answer, set up the conditions, in which appeared an erasure in a material part. The jury having found that the erasure was made by the architect after the plaintiff had signed, the plaintiff contended that the document was void, and that he might sue on a quantum meruit:—

Held, that, notwitstanding the erasure, the conditions were either still the governing document, or at least must be looked at to see what were the real terms of the contract; and that the plaintiff could not recover.

THE action was brought to recover about 370*l.*, the balance of a builder's account.

The declaration contained the common money counts for goods sold, work done, &c., money paid, money received, and money due on an award, and on accounts stated.

The defendant paid money into Court, and pleaded never indebted as to the residue. Issue thereon. (1)

At the trial before Field, J., at the Newcastle Spring Assizes, 1875, the plaintiff proved that in 1872 he erected buildings on the defendant's land at his request. During the progress of the

(1) The declaration contained also three special counts which are not material to this report, since the learned judge at the trial ruled, and the plaintiff's counsel admitted, that there was no evidence in support of them.

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works the plaintiff and defendant signed a document partly printed and partly written, which had been prepared by the defendant's architect, and contained the conditions upon which the buildings were to be erected and paid for. This document was kept by the architect after the plaintiff had signed it. When produced in Court, it was found that in the eighth condition, which provided that no charges should be allowed for extra works for which written orders had not been given by the architect or clerk of the works, there had been an erasure. The plaintiff swore that when he signed the document the words were to the effect that written orders would not be required for extra works, and that these words had been erased after he had signed, and without his knowledge. The architect being called for the defence, swore that the document had not been altered since the plaintiff signed it; and that the only words erased were to the effect that written orders for extras should be countersigned by the proprietor, and that these words had been erased before the plaintiff signed, and at his request. Part of the balance now sued for was in respect of extra works for which no written orders had been given, but which the plaintiff said had been executed with the defendant's approval. One of the conditions made the certificate of the architect a condition precedent to the right to any payment, and the plaintiff's counsel admitted that the architect's certificate had not been obtained for the works which were the subject of this action; that the plaintiff had been paid for all the works for which the architect had given a certificate, and therefore could not sue upon the conditions; but contended that the document, after execution, had been altered in a material part by the defendant's agent, the architect, who had the custody of it; that it was therefore void, and that the plaintiff could sue upon a quantum meruit. In answer to questions put by Field, J., the jury found that the words erased were that written orders should not be required for extra works, and that they were erased by the architect after the plaintiff had signed the conditions. Field, J., thereupon entered the verdict for the plaintiff, subject to a reference to an arbitrator as to the amount, reserving leave generally to the defendant to move to enter the verdict for him.

A rule nisi having accordingly been obtained to enter a nonsuit or a verdict for the defendant, on the ground that, notwithstanding

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the erasure or alteration in the contract alleged by the plaintiff and found by the jury, the plaintiff was not entitled to recover, or for a new trial on the ground that the verdict was against the weight of the evidence,

Herschell, Q.C., and *G. Bruce*, for the plaintiff, shewed cause. The instrument containing the conditions having been altered in a material part on the defendant's behalf and for his benefit by the architect who had the custody of it, it is the same as if the defendant had himself made the alteration, and he is precluded from setting up the instrument against the plaintiff, or taking advantage of it in any way whatever; as regards him it is void, or is as if it did not exist: *Pigot's Case* (1); *Powell* v. *Divett* (2); *Aldous* v. *Cornwell* (3); *Davidson* v. *Cooper* (4) (as to alteration by a stranger).

[CLEASBY, B., referred to *Croockewit* v. *Fletcher*. (5)]

See also *Burchfield* v. *Moore* (6); and the notes to *Master* v. *Miller*. (7) The plaintiff can, therefore, sue on a quantum meruit.

[BRAMWELL, B. Is not the plaintiff in this difficulty? He has built a house upon the defendant's land, which will belong to the defendant unless the plaintiff can prove a contract to pay him for it?]

He proves the contract by shewing that the works were done at the defendant's request.

[After hearing the argument upon the evidence, and examining the instrument containing the conditions, the Court said they were prepared to make the rule absolute for a new trial, on the ground that the verdict was against the weight of evidence, but]

R. G. Williams, Q.C., and *John Edge*, for the defendant, contended that he was entitled to enter the verdict; because, though the instrument was so far vitiated that the defendant could not have sued upon it as an executory contract, it was still the instrument governing the contract, or at least must be looked at to see what the terms were before the plaintiff could recover,

(1) 11 Co. Rep. 26 b.
(2) 15 East, 29.
(3) Law Rep. 3 Q. B. 573.
(4) 11 M. & W. 778; on appeal, 13 M. & W. 343.
(5) 1 H. & N. 893; 26 L. J. (Ex.) 153.
(6) 3 E. & B. 683; 23 L. J. (N.S.) Q. B. 261.
(7) 1 Sm. L. C. 871, 7th ed.

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and the plaintiff having failed to comply with those terms could not maintain this action; and they relied on *Earl of Falmouth* v. *Roberts* (1), where the defendant became tenant to the plaintiff of a farm from year to year by parol, but afterwards signed an agreement containing certain stipulations as to the mode of tillage. In an action by the landlord for breaches of these stipulations, the agreement, on being produced, contained an erasure in the term of years mentioned in the habendum, which was altered from seven to fourteen. Held, that the agreement might be received in evidence without any explanation of the erasure, the term of years being immaterial to the parol contract. Parke, B., there said, during the argument, "The general rule undoubtedly is, that where there appears to be an alteration in the document, it lies upon the party producing it to explain it. . . . The rule of law applies where the obligation is by reason of the instrument: here the obligation is by reason of the parol contract of the parties, quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year; as to which an alteration in the term of years is wholly immaterial." [They also cited *Fazakerly* v. *M'Knight* (2); *The Mercantile Bank* v. *Gladstone* (3); and *Smidt* v. *Tiden*. (4)]

BRAMWELL, B. The rule must be absolute. It is remarkable that there is no authority on the point, but on principle I think our judgment should be for the defendant. We must assume that the verdict was correct, that the document was altered after execution without the consent of the plaintiff, and upon the authorities I think we must hold that the defendant was as responsible for the alteration as if he had made it himself, since it was made by the person who was holding the document for the defendant and for his benefit.

The question is not what the defendant could do against the plaintiff—not what the defendant's rights are. It may be that, if

(1) 9 M. & W. 469, 471.
(2) 6 E. & B. 795; 26 L. J. (Q.B.) 30.
(3) Law Rep. 3 Ex. 233.
(4) Law Rep. 9 Q. B. 446.

2 Jur. N.S. 1020

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the plaintiff had done none of the work, and the defendant had sought to enforce the contract after having spoiled the document, on the authority of *Powell* v. *Divett* (1) he would have been unable to enforce the contract; or that, if the plaintiff had done the work badly, the defendant could not have enforced the contract by an action for bad building. I give no opinion on that question; if it were necessary to decide it, I should desire further time for consideration. But the question we must decide is, on what terms the plaintiff is entitled to be paid. I am strongly inclined to think that he is entitled to be paid on the terms actually agreed on. If he fails to shew any bargain, he is not entitled to be paid at all. In the case of goods sold and delivered, it is easy to shew a contract from the retention of the goods; but that is not so where work is done on real property; and the plaintiff, therefore, in shewing what the bargain was, must shew all the terms. It is of no use to answer, as Mr. Herschell did, that he has made out a primâ facie case by telling half the truth. We must have the whole truth. I doubt, therefore, if the document has been so spoiled as not to be still the intrinsically governing document—because, if not, there are innumerable difficulties. Suppose the claim on the quantum meruit were to the plaintiff's detriment, instead of being to his advantage, would he be deprived of his right to sue on the contract? Surely not. Then, has he an option to sue on a quantum meruit or on the document at his pleasure? No doubt there are cases where a man may so conduct himself as to give an option, but they do not apply here. The question is, what was the contract? Not what is it the plaintiff's pleasure to say the contract was.

Again, suppose the contract were by deed, and the deed were so mutilated as not to be binding, would the plaintiff lose the benefit of the contract being by deed, and lose his right of action for a debt after the expiration of six years? I doubt it. So, if the seals were cut off a deed by which an estate passed, the estate would not revest in the grantor. (2)

All these considerations tend to shew that where a person

(1) 15 East, 29.

(2) See *West* v. *Steward*, 14 M. & W. 47, cited in the notes to *Master* v. *Miller*, 1 Sm. L. C. 919, 7th ed.

claiming to be paid for work did the work under an instrument of contract, that instrument, though altered in a material part, is still the governing document to determine the rights of the plaintiff.

But if I am wrong, and the instrument is not intrinsically binding, still I think it may be looked at to see the terms of the contract. Upon this point the case of *Earl of Falmouth* v. *Roberts* (1) is material, and the observations of Parke, B., are of great value in shewing what our conclusion ought to be; that even if we hold that the instrument ceased to have any intrinsic operation, still we must look at it to see the terms of the bargain. The plaintiff, therefore, must make out his case in accordance with those terms. But it is admitted that he has been paid for all works for which the architect has certified, and that if he is bound by the terms of the conditions which make the architect's certificate a condition precedent to the right to payment, the verdict is wrong. I think that he is bound by those conditions, and that the rule must therefore be absolute to enter the verdict for the defendant.

The defendant is also entitled to have the question reserved as to a new trial on the ground that the verdict was against the weight of the evidence, in the event of our decision on the point of law being reversed in the Court of Appeal. There are precedents for this course in several cases within my own knowledge.

CLEASBY, B. I am of the same opinion. It is not intended to overrule or qualify any of the decisions as to the effect of altering a written contract. There is sound reason for abiding by the principle of those decisions. But we must see how the principle is evoked before applying the general rule which prevents a person from setting up a contract for his own benefit if he has altered it. The contract remains: the disability is on the person who has altered it: it would be ridiculous to suppose that his act has destroyed the rights of others. We must look at the nature of the case. This is not a contract to pay a sum of money or do one thing, but an agreement operating over twelve months

(1) 9 M. & W. at p. 471.

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or more. It is to be acted on from time to time, and as it has been acted on, it is impossible to say one can undo what has been done, and that payments can be recovered back, and that the agreement ceased to be operative while it was being acted on and treated as binding by both parties. That is a satisfactory ground on which to rest our decision.

POLLOCK, B. I am of the same opinion. I agree with that part of the plaintiff's argument which goes to shew that the alteration was material, and that the general rule applies that the defendant could not ask us to give effect to the contract as a binding executory contract. But that is not the defendant's proposition. Mr. Herschell went further, and said the defendant could not take advantage of the contract, and that it was as if the written contract had never existed. The true rule is laid down by Parke, B. in *Earl of Falmouth* v. *Roberts*. (1) We are asked to infer another contract, shutting out what we know occurred, and what was the essence of the contract. By our decision we are carrying out substantially the real contract.

Rule absolute.

Attorneys for plaintiff: *Pattison, Wigg, & Co., for R. S. Hopper, Newcastle.*

Attorney for defendant: *J. Scaife, for Chartres & Youll, Newcastle.*

(1) 9 M. & W. at p. 471.

[IN THE EXCHEQUER CHAMBER.]

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GOODWIN *v.* ROBARTS AND OTHERS.

Negotiable Instrument—Foreign Scrip issued by Agent in England.

Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment in full of the instalments due from him, to delivery by the agent of definitive bonds of the foreign government on their arrival in this country, and which by the usage of bankers and dealers in public securities, is transferred by mere delivery, passes by such delivery to a bonâ fide holder for value without title.

Affirmed by House of Lords, 1 App Cas 476

ERROR by the defendants on a judgment of the Court of Exchequer in favour of the plaintiff.

The facts are fully stated in the report of the case in the Court below (ante, p. 76).

May 15; June, 23, 24. *Benjamin, Q.C.* (*Anstie* with him), for the defendants. The scrip in question is not by the law merchant negotiable, and no usage of trade, no consensus of merchants, can make it so: *Crouch* v. *The Crédit Foncier* (1); *Partridge* v. *Bank of England* (2); *Dixon* v. *Bovill.* (3) *Gorgier* v. *Mieville* (4) does not touch the present case. All that was held there was that the bond sued on must be treated as a foreign promissory note. Suppose that by the usage of foreign nations a contract to deliver goods by instalments was negotiable, this practice could not alter the English law. Secondly, the contract under which the scrip was issued is an English contract; wherever A. makes a contract by his agent, he is there by implication of law. Before the Russian Government issues its bonds the contract relating to them is made in London.

To hold that scrip certificates are not negotiable in the sense contended for would lead to no inconvenience. A traffic in such imperfect and inchoate instruments is not beneficial to commerce. [He cited *Attorney General* v. *Bouwens* (5); *Thompson* v. *Dominy* (6); *Edie* v. *East India Company.* (7)]

(1) Law Rep. 8 Q. B. 374.
(2) 9 Q. B. 396; 15 L. J. (Q.B.) 395.
(3) 3 Macq. 1.
(4) 3 B. & C. 45.
(5) 4 M. & W. 171.
(6) 14 M. & W. 403.
(7) 2 Burr. 1216.

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J. Brown, Q.C. (*C. H. Robarts*, with him), for the defendants. The judgment of the Court below was clearly right. Foreign bonds have repeatedly been held to be negotiable. In the present case it is intended that the scrip shall be the representative of the bond till it is issued, and that the holder shall have the power of pledging or otherwise disposing of it by delivery. The Courts will give effect to the reasonable engagements of a foreign sovereign, in accordance with the usage of trade: *Lang* v. *Smyth* (1); *Jones* v. *Peppercorne* (2); *Miller* v. *Race* (3); *Carvick* v. *Vickery* (4); *Wookey* v. *Pole* (5); *Brandao* v. *Barnett* (6); *Benson* v. *Chapman*. (7) It was clearly intended that the scrip should be considered as property, and not merely evidence of a contract. It is very doubtful whether there is anything in the scrip certificate from which any contract can be implied on the part of the agent. Credit is given to the foreign government, who are disclosed in the document: *Green* v. *Kopke* (8); Story on Agency, § 306. The decision of the Court below is founded on the interests of commerce, and is supported by American as well as by English authorities: *Mitchell* v. *Baring* (9); *Edie* v. *East India Company* (10); Williams on Executors, 7th ed. vol. i. p. 621; Kent's Comm. vol. 3, 12th ed. p. 89; *White* v. *Vermont Ry. Co.* (11); *Brainerd* v. *New York and Harlem Ry. Co.* (12); *National Exchange Bank* v. *Hartford R. R. Co.* (13)

Benjamin, Q.C., in reply, cited *Glover* v. *Persigny* (14); *Lloyd* v. *Guibert*. (15)

Cur. adv. vult.

July 7. The judgment of the Court (Cockburn, C.J., Mellor, Lush, Brett, and Lindley, JJ.) was delivered by

COCKBURN, C.J. The question for our decision in this case is whether certain scrip issued by the authority of the Russian Government, and certain other scrip issued by the authority of the

(1) 7 Bing. 284.
(2) Johns. 430; 28 L. J. (Ch.) 158.
(3) 1 Sm. L. C. 5th ed. 450, 459.
(4) 2 Dougl. 653.
(5) 4 B. & Ald. 1, 18.
(6) 12 Cl. & F. 787, 805.
(7) 8 C. B. 967, n.
(8) 18 C. B. 549; 25 L. J. (C.P.) 297.
(9) 4 C. & P. 35.
(10) 2 Burr. 1216.
(11) 21 How. (U.S.) 575.
(12) 11 Smith's N. Y. 496.
(13) 8 Rhode Isld. 375.
(14) 11 Weekly Rep. 146.
(15) Law Rep. 1 Q. B. 115.

(2) 5 C 5 Jur N S 140. (8) C 2 Jur N S. 1049

Austro-Hungarian Government, is a negotiable security for money, so that the transfer of it by a person not being the true owner to a bonâ fide holder, for value, can confer a good title on the latter.

The scrip in question was bought by the plaintiff through one Clayton, a stockbroker, and was allowed to remain in Clayton's hands, who unlawfully pledged it with the defendants, who are bankers, as security for a loan of money. Clayton having become bankrupt and having absconded, the defendants sold the scrip at the market price of the day, and the plaintiff brings his action to recover the amount realised on such sale.

The scrip in question was in the following form:—

"1873 . C. 1873. Imperial Government of Russia. Issue of 15,000,000*l.* sterling nominal capital in 5 per cent. consolidated bonds of 1873. Negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. de Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st of December, 1873. Scrip for one hundred pounds stock, No. ——.

"Received the sum of twenty pounds, being the first instalment of 20 per cent. upon one hundred pounds stock, and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial Government.

"London, 1st December, 1873. The instalments are to be paid at our office as follows: 15*l.* per cent., or 15*l.*, on the 5th February, 1874; 15*l.* per cent., or 15*l.*, on the 9th of March, 1874; 20*l.* per cent., or 20*l.*, on the 2nd May, 1874; 23*l.* per cent. or 23*l.*, on the 9th June, 1874. Subscribers may pay the same, under a discount at 3 per cent. per annum, on any Monday or Thursday after the 16th instant.

"In default of payment of these instalments at the proper dates, all previous payments will be liable to forfeiture." Then follow four other receipts for 20*l.* each, making up the 100*l.*, for which the bond is afterwards to be given.

The scrip issued by the authority of the Austro-Hungarian Government was in a precisely similar form.

The scrip in question was issued by Messrs. de Rothschild as the agents of the Russian and Austro-Hungarian governments, they

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being employed by these governments to negotiate and raise a loan for them respectively on government bonds, bearing interest, to be afterwards issued in exchange for the scrip when all the instalments of the sum for which the scrip was issued should have been paid up. No question is raised as to the fact of Messrs. de Rothschild having acted in the matter as agents of the two governments, or of the scrip having been issued by the authority of the latter.

The bonds issued on the last instalment being paid up were, as will be seen on reference to the special case in which they are set out, in conformity with the terms stated in the scrip. It is only necessary to point out that the bond, agreeably to the terms of the scrip, is made payable to bearer.

The 9th paragraph of the special case contains the following statement, upon which, as it appears to us, the decision of the case turns:—

"The scrip of loans to foreign governments, entitling the bearer thereof to bonds for the same amount when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and Foreign Stock Exchanges, and through them by the public, for over fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealing by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognised by the foreign governments or their agents delivering the bonds when issued to the bearers of the scrip. This usage extended alike to scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above mentioned. Such scrip often passes through the hands of several buyers and dealers in succession before the issue of the bonds represented by it."

The contention on the part of the plaintiff was that, scrip of this description not coming under the category of any of the securities for money which, by the law merchant, are capable of being trans-

ferred by indorsement or delivery—indeed, not being a security for money at all, but only for the future delivery of a bond—the right of the true owner could not be divested by the fraudulent transfer of the chattel by a person who had no title as against the owner.

On the part of the defendants it was contended that the finding as to general usage brought the case within the decisions in *Gorgier* v. *Mieville* (1) and *Attorney General* v. *Bouwens*. (2) In the former of these cases a bond of the King of Prussia, payable "to every person who should for the time being be the holder of the bond," had been, as in the present instance, unlawfully pledged with the defendants in the action, by an agent who had been intrusted with it for the purpose of receiving the interest on it. The owner having brought an action to recover the bond, it was proved on the trial that bonds of this description were sold in the market, and passed from hand to hand daily, like exchequer bills, at a variable price, according to the state of the market. Upon these facts Lord Chief Justice Abbott was clearly of opinion that this bond might be pledged to any person who did not know that the person pledging it was not the real owner, and he directed the jury to find a verdict for the defendants, unless they thought that the defendants knew that Messrs. Agassiz & Co., the pledgors, were not the owners of the bond at the time when they deposited it in their hands. A rule nisi for a new trial, having been obtained, was afterwards discharged. Abbott, C.J., in giving judgment, says: "This instrument in its form is an acknowledgment by the King of Prussia that the sum mentioned in the bond is due to every person who shall for the time being be the holder of it; and the principal and interest is payable in a certain mode and at certain periods mentioned in the bond. It is, therefore, in its nature precisely analogous to a banker's note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it has power to give title to any person honestly acquiring it. It is distinguishable from the case of *Glyn* v. *Baker* (3), because there it did not appear that India

(1) 3 B. & C. 45. (2) 4 M. & W. 171.

(3) 13 East, 509.

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bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like exchequer bills."

In *Attorney General* v. *Bouwens* (1), the question as to the negotiable character of foreign bonds arose in a different form, the question being whether Russian, Danish, and Dutch bonds, of which a testator, dying in this country, was holder at the time of his death, were liable to probate duty. In a special verdict taken at the trial it was expressly found "that the said Russian, Danish, and Dutch bonds respectively were and are, and always have been, marketable securities within this kingdom, and always have been sold and transferred within this kingdom by delivery only, and the bearers thereof have always been deemed and reputed to be, and have always been dealt with as being, legally entitled to the principal moneys secured by the said bonds respectively, and to the interest or dividends from time to time arising or accruing in respect of the same. It never has been nor is it necessary to do or perform any act whatsoever out of the kingdom of England, in order to render a transfer of any of the said bonds valid, and the bearers of the said bonds respectively have always been treated and dealt with by the agents of the empire of Russia, and of the kingdoms of Holland and Denmark, as the persons duly entitled to the principal moneys secured by the said bonds respectively, and the interest or dividends thereof, and such agents have always paid all moneys due and payable for and in respect of the said bonds respectively, according to the tenor and effect thereof to the bearers of the same."

In like manner, in *Heseltine* v. *Siggers* (2), Spanish bonds were treated as passing by mere delivery.

Strenuous efforts were made by Mr. Benjamin in his able argument on behalf of the plaintiff to distinguish the present case from *Gorgier* v. *Mieville*. (3) He insisted, first, that although it must be admitted that, if a bond had been given in lieu of this scrip, the bond would have been a negotiable instrument, as the case would then have come within *Gorgier* v. *Mieville* (3), here there was no

(1) 4 M. & W. 171.

(2) 1 Ex. 856; 18 L. J. (Ex.) 166.

(3) 3 B. & C. 45.

engagement on the part of the foreign government. The only party signing the scrip, or who could be held bound by it, were the Messrs. de Rothschild; and the persons advancing their money, and taking the scrip, could look only to them. Secondly, that even assuming that the issuing of the scrip was to be taken to be the act of the foreign government, yet that as it had been issued in London, and the parties taking it had advanced their money in this country, the contract must be taken to have been made here, and must be subject to the law of England. That when a foreign sovereign negotiated a loan in this country, through his agent, it was in effect the same thing as though such sovereign had himself come to this country and entered into the contract in person. That, consequently, in either view, the contract arising on the scrip must be taken to have been made here, and must be dealt with according to English law. That this being so, the case of *Crouch* v. *The Crédit Foncier of England* (1), was an authority which established that it was not competent to anyone, by the law of England, to give to a security, not negotiable by the law merchant, the character of negotiability, by making it payable to bearer, even though such security were a security for money. That, a fortiori, this scrip, not being a promise to pay money, but only to give a bond when all the instalments should have been paid up, could not have the character of negotiability given to it by being made payable to bearer. That choses in action not being assignable by the general common law, it was only by the law merchant, which was recognised by the common law and adopted by it, that a particular class of securities for money could be made negotiable, either by indorsement, or by being made payable to bearer; and that this class of securities was confined to bills of exchange, promissory notes, and drafts payable to bearer. That this scrip did not coincide with either of the securities for money to which by the law merchant, the quality of being so rendered negotiable had been conceded; the more so as in fact it was not a security for money at all, but only an agreement to give such a security in the shape of a bond. That the bonds of foreign governments had been held to be negotiable by the Courts of this country, not because they were negotiable by the law of the country in which

(1) Law Rep. 8 Q. B. 374.

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they were made, but because they were in substance and effect promissory notes.

We entirely dissent from the contention that the contract in question is one in which the Messrs. de Rothschild can be looked upon as principals. And though our decision on that head may not be essential to the conclusion we have arrived at on the case, we think it desirable in a matter in which the public are so much interested that our view should be made known. It is plain on the face of the document that the Messrs. de Rothschild only profess to be acting as the agents of the foreign governments. The law on this subject is correctly laid down in Story on Agency, in the chapter on the Liabilities of Public Agents, s. 302. Collecting the English and American authorities in a note, the learned jurist writes as follows: "In the ordinary course of things, an agent, contracting on behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is, that it is not to be presumed, either that the public agent means to bind himself personally in acting as a functionary of the government, or, that the party dealing with him in his public character, means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made upon the credit and responsibility of the Government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man, and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconvenience would result from a different doctrine, considering the various public functionaries which the government must employ in order to transact its ordinary business and operations; and many persons would be deterred from accepting of many offices of trust under the government, if they were held personally liable upon all their official contracts. This principle not only applies to simple contracts, both parol and written, but also to instruments under seal, which are executed by agents of the government in their own name, and purport to be made by them on behalf of the government; for the like presumption prevails in such cases,

that the parties contract not personally, but merely officially, within the sphere of their appropriate duties."

Chancellor Kent lays down the law to the like effect (2nd Commentaries, p. 810, 7th ed.), "There is a distinction in the books between public and private agents on the point of personal responsibiity. If an agent, on behalf of government, makes a contract and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government, and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the general inference to be drawn from all the cases, and it is expressly declared in some of them."

It is true these authors are speaking of persons acting as agents for their own governments; but the reasoning applies equally to persons acting as agents for a foreign government, and the same presumption must arise in both cases. Nor can we suppose that the persons taking this scrip did so otherwise than through their faith in the honour of the foreign government, just as they would have had to trust to it on their afterwards receiving the bonds in lieu of the scrip. They would then be equally without legal redress against the foreign government and must have trusted to its honour in the fulfilment of its engagements.

We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract, as we agree in thinking that its negotiable character, if it exists at all, must depend not on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here. "The question," says Tindal, C.J., in *Lang* v. *Smyth* (1) "is not so much what is the usage in the country whence

(1) 7 Bing. 284, at p. 293.

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the instrument comes, as in the country where it passed." The substance of Mr. Benjamin's argument is, that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach.

Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the lex mercatoria, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, in *Brandao* v. *Barnett* (1), "it becomes a part of the law merchant, which Courts of justice are bound to know and recognise."

Bills of exchange are known to be of comparatively modern

(1) 12 Cl. & F. at p. 805.

origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the Lex Mercatoria, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shews that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. 2, c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shews that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin* v. *Boure* (1), in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann,

(1) Cro. Jac. 6.

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in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Savary, cited by Mons. Nouguier, in his work "Des lettres de change," had assigned to it a later date, namely 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our Courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on Bills, 8th ed., p. 13.

In the meantime, promissory notes had also come into use, differing herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of *Shelden* v. *Hentley* (1), an action was brought on a note under seal by which the defendant promised to pay *to bearer* 100*l.*, and it was objected that the note was void because not made payable to a specific person. But it was said by the Court, "Traditio facit chartam loqui, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to *the bearer* of the note, anyone that brings the note shall be paid." Jones, J., said that "it was the custom of merchants that made that good." In *Bromwich* v. *Lloyd* (2), the plaintiff declared upon the custom of merchants in London, on a note for money payable on demand, and recovered; and Treby, C.J., said that "bills of exchange were originally between foreigners and merchants trading with the English; afterwards,

(1) 2 Show. 160. (2) 2 Lutw. 1582.

when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and, therefore, the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial." To which Powell, J., added, "On indebitatus assumpsit for money received to the use of the plaintiff the bill may be left to the jury to determine whether it was given for value received."

In *Williams* v. *Williams* (1), where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error, that the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the Court would take notice of it ex officio; and, therefore, it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person secundum usum et consuetudinem mercatorum, drew the bill." And the plaintiff had judgment.

Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange had received the sanction of the Courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

(1) Carth. 269.

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It is obvious from the preamble of the statute, which merely recites that "*it had been held* that such notes were not within the custom of Merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The Statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country, as cash, Lord Mansfield and the Court of King's Bench had no difficulty in holding, in *Miller* v. *Race* (1), that the property in such a note passes, like that in cash, by delivery, and that a party taking it bonâ fide, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner it was held, in *Collins* v. *Martin* (2), that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

Both these decisions of course proceeded on the ground that the property in the bank-note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made bonâ fide.

A similar question arose in *Wookey* v. *Pole* (3), in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favour of blank or order, contained this clause, "If the blank is not filled up the bill will be paid to bearer." Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiffs' agent, had been deposited by him with the defendants, on a bonâ fide advance of money. It was held by three judges of the Queen's Bench, Bayley, J., dissentiente, that an exchequer bill was a negotiable

(1) 1 Burr. 452. (2) 1 B. & P. 648.

(3) 4 B. & Ald. 1.

security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. "The Courts," he says, "have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities shew, that not only money itself may pass, and the right to it may arise, by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property (i.e. money), to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it."

Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the Courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer (see *Pott* v. *Clegg*. (1)) Besides this, a custom has grown up among bankers

(1) 16 M. & W. 321.

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themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another.

Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of *Lickbarrow* v. *Mason* (1), that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our Courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usage, adopted by the Courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the

(1) 2 T. R. 63.

amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such.

The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security, to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. It is one which may be in a great degree prevented by prudence and care. It is one which is counterbalanced by the general convenience arising from facility of transfer, or the usage would never have become general to make scrip available to bearer, and to treat it as transferable by delivery. It is obvious that no injustice is done to one who has been fraudulently dispossessed of scrip through his own misplaced confidence, in holding that the property in it has passed to a bonâ fide holder for value, seeing that he himself must have known that it purported on the face of it to be available to bearer, and must be presumed to have been aware of the usage prevalent with respect to it in the market in which he purchased it.

Lastly, it is to be observed that the tendency of the Courts, except only in the time of Lord Holt, has been to give effect to mercantile usage in respect to securities for money, and that where legal difficulties have arisen, the legislature has been prompt to give the necessary remedy, as in the case of promissory notes and of the East India bonds.

The authorities relied on on the part of the plaintiff do not appear to us materially to conflict with this view. In *Glyn* v. *Baker* (1), which was an action to recover India Bonds, and in which it was held that such bonds did not pass by delivery, the bonds were not made payable to bearer, and there was a total

(1) 13 East. 509.

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absence of proof that they passed by delivery, though it was asserted by counsel in argument that when these bonds, which in the first instance were made payable to the treasurer of the company, had been indorsed by him, they were afterwards negotiable and passed by delivery from one to another. The inconvenience which would have arisen from this decision was remedied by the immediate passing of 51 Geo. 3, c. 64, by which bonds of the East India Company were made transferable by delivery.

The case of *Partridge* v. *Governor and Company of the Bank of England* (1), and which, amongst other things, turned on the negotiability of dividend warrants of the Bank of England, is not, so far as that question is concerned, altogether satisfactory, as the decision turned also upon other points. The bank were in the habit of paying dividends to those entitled to them by warrants, and it was pleaded and proved that by a usage of sixty years standing of the bankers and merchants of London, these warrants, which are not made to bearer, were nevertheless negotiable so soon as the party to whom they were made payable had annexed to them the receipt which the bank required before payment would be made. Such a warrant had been obtained by an agent of the plaintiff authorized to receive his dividends, and had been made over to the defendants for good consideration, in fraud of the plaintiff, so far as the agent was concerned, but without knowledge of such fraud on the part of the defendants. The warrant had been delivered by the defendants to the bank, with whom they had an account, to be carried to their credit, and the amount had been entered to their credit in the cash book of the defendants, but had not been carried to their drawing account. The Court of Queen's Bench held this proof of the custom to be a good defence. The Court of Exchequer Chamber reversed their judgment, on the ground, among others, that the custom relied on was "rather *a practice of trade* than *a custom* properly so-called, and that such a practice could not alter the law according to which such an instrument conferred no right of action on an assignee." We quite feel the force of this distinction, though it is not quite so clear in what sense it was here intended to be applied. Possibly what was meant was, that the custom applied to the

(1) 9 Q. B. 396; 15 L. J. (Q.B.) 395.

warrants of a particular company, and therefore could not form the subject of any general mercantile usage.

In *Dixon* v. *Bovill* (1), where the note was "to deliver so much iron when required to the party lodging this document with me," there was neither a promise to bearer, nor was there any proof whatever of any usage whereby such notes were dealt with as negotiable. The case has therefore, with reference to its facts, no bearing on the present.

In *Crouch* v. *The Crédit Foncier of England* (2), the defendants, a limited company, had issued bonds payable to bearer, "subject to the conditions indorsed on this debenture;" and by the conditions so indorsed the bonds were to be paid off by a certain number being drawn at stated periods; in which respect, it may be observed, they bore a close resemblance to the bonds of foreign governments when loans are thus raised by way of bond. A bond thus made having been stolen from the lawful owner, and having been purchased bonâ fide by the plaintiff from the thief, was drawn for payment. The plaintiff claimed payment, which was refused, whereupon the action was brought. It was there held by three judges of the Court of Queen's Bench that the plaintiff could not recover; first, because, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. No evidence had been offered at the trial as to whether these or similar documents were in practice treated as negotiable, nor was any express admission made as to the point; but it was assumed, from the report of the learned judge before whom the cause was tried, that this had been tacitly admitted. But it was said that these instruments having been only of recent introduction, it followed that such custom, to whatever extent it had gone, must also have been quite recent. Under these circumstances the Court held that, while it was incompetent to the defendants, as an individual company, to give to that which was not a negotiable instrument at law the character of negotiability by making it payable to bearer, the custom could not have that effect, because, being recent, it formed no part of the ancient law merchant. For the reasons we have already given we cannot concur in thinking the latter

(1) 3 Macq. 1.

(2) Law Rep. 8 Q. B. 374.

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ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shewn to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to *Gorgier* v. *Mieville* (1), are to be treated as negotiable. We think the judgment in *Crouch* v. *The Crédit Foncier* (2) may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called "the ancient law merchant."

In addition to the cases we have already referred to, in which usage has been relied on as making mercantile instruments negotiable, the case of *Lang* v. *Smyth* (3) was cited as shewing that the question with reference to instruments of this description turns upon how far the particular instrument has by usage acquired the quality of negotiability. The action had reference to Neapolitan bonds with coupons attached to them, which latter referred to a certificate. The plaintiff's agent being in possession of the coupons belonging to the plaintiff, but not of the certificate, fraudulently pledged the coupons with the defendant, who took them bonâ fide. On an action by the plaintiff to recover the amount received by the defendant on the coupons, Tindal, C.J., left it to the jury to say whether the coupons without the certificate "passed from hand to hand like money or bank notes," in other words, "whether they had acquired, from the course of dealing pursued in the City, the character of bank notes, bills of exchange, dividend warrants, exchequer bills, or other instruments which formed part of the currency of this country." The jury, indeed, found in the negative, but it was held by the Court of Common Pleas that the question had been rightly left to them. If the usage had been

(1) 3 B. & C. 45.

(2) Law Rep. 8 Q. B. 374.

(3) 7 Bing. 284.

found the other way, and the Court had been satisfied with the verdict, it would no doubt have been upheld.

We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the Courts, have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself. Thus, it having been decided in the two cases of *More* v. *Manning* (1), and *Acheson* v. *Fountain* (2), that when a bill of exchange was indorsed to A. B., without the words "or order," the bill was nevertheless assignable by A. B., by further indorsement, Lord Mansfield and the Court of King's Bench, in the case of *Edie* v. *The East India Company* (3), held that evidence of a contrary usage was inadmissible. In like manner in *Grant* v. *Vaughan* (4), where a cash note, payable to bearer, had been lost by the owner, but had been taken by the plaintiff bonâ fide for value, on an action on the note by the latter against the maker, Lord Mansfield having left it to the jury to say "whether such drafts as this, when actually paid away in the course of trade dealing and business, were negotiable or in fact and practice negotiable," and the jury, influenced no doubt by the natural desire to protect the owner of the note, having found for the defendant, Lord Mansfield and the Court here again set the verdict aside, on the ground that, the law having been settled by former decisions that notes payable to bearer passed by delivery to a bonâ fide holder, the judge ought to have directed a verdict for the plaintiff.

If we could see our way to the conclusion that, in holding the scrip in question to pass by delivery, and to be available to bearer, we were giving effect to a usage incompatible either with the common law or with the law merchant as incorporated into and

(1) 1 Comyns' Rep. 311.
(2) 1 Str. 557.
(3) 2 Burr. 1216.
(4) 3 Burr. 1516.

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embodied in it, our decision would be a very different one from that which we are about to pronounce. But so far from this being the case, we are, on the contrary, in our opinion, only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer, as assignable by delivery. This being the conclusion at which we have arrived, the judgment of the Court of Exchequer will be affirmed.

Judgment affirmed.

Attorney for plaintiff: *Batten.*
Attorney for defendants: *Mackenzie.*

July 7.

[IN THE EXCHEQUER CHAMBER.]

SCAIFE *v.* FARRANT.

Common Carrier by Land—Contracts to carry Furniture.

The defendant was the agent of a railway company for collecting and delivering goods and parcels, and also carried on upon his own account the business of a carrier, removing goods and furniture for hire for all persons indifferently who applied to him, in his own vans, which he sent by road or rail to all parts of England, the goods and furniture being previously inspected before any contract was made. Generally in such contracts the van or vans were hired by and filled with the goods of one person only. The plaintiff having applied to the defendant to remove his furniture from one town to another, and the defendant's foreman having inspected it, the parties agreed that the defendant should remove the furniture for 22*l.* 10*s.*, the defendant "undertaking risk of breakages (if any) not exceeding 5*l.* on any one article." After the furniture was placed in the defendant's vans, and while in transit, it was burnt without any negligence on the defendant's part. The plaintiff having brought an action for the loss, contended that the defendant was liable as a common carrier:—

Held (affirming the judgment of the Court below), that the special contract shewed that the parties intended to limit the defendant's liability to loss by breakage or by the defendant's negligence, and excluded any question of liability as a common carrier; and that the plaintiff could not recover.

APPEAL from the Court of Exchequer.

The defendant was the agent of the South Devon Railway Company, at Torquay, for collecting and delivering goods and parcels for the company about the town and neighbourhood, and also carried on, upon his own account, the business of a

carrier, removing and carrying goods and furniture for hire for all persons indifferently who applied to him. The terms upon which he conducted such business appeared on the following card:—

"S. D. Railway, Goods and Parcel Office, Torquay. W. Farrant, sole agent. Furniture, &c., carefully stored for any period. Spring vans, carts, and horses on hire. Large lock-up vans for removing glass, china, furniture, &c., by road or rail, without packing. Contracts entered into for removing furniture to or from any part of the kingdom. Estimates given free."

His offices were at Torquay, and his trade was chiefly conducted by means of vans, which he sent by road or rail to all parts of England. A considerable part of his business consisted in the carriage of furniture and household goods in these vans. The course of business was for the defendant, or his foreman, to inspect the furniture and goods of a customer before any contract with the customer was made, and after such inspection the price was fixed. Generally the van or vans on each particular occasion were hired by and filled with the goods of one person only. In August, 1873, the plaintiff applied to the defendant to remove his furniture and effects from Paignton to Plymouth. The defendant's foreman thereupon was sent by the defendant to inspect the furniture and effects of the plaintiff, and afterwards the plaintiff received the following letter signed by the defendant:—

"Aug. 19, 1873.

"Sir,—I beg to inform you the terms for removal of your furniture and effects (as seen by my foreman) from Paignton to Plymouth will be 22*l.* 10*s.* with risk of breakages in transit, including the use of all necessary mats, cases, and packing materials, and every expense. In the event of your accepting this estimate, be kind enough to sign and return to me the annexed memorandum, by which I am liable to the amount therein specified. Payment of the account is required on delivery of the goods."

On the other side of this letter was the following memorandum above referred to, which was signed by the plaintiff and returned to the defendant:—

"To Mr. Wm. Farrant,—I hereby agree to pay you the sum of

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22*l.* 10*s.* for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakages (if any) not exceeding 5*l.* on any one article. I am yours, &c.,

"H. M. Scaife."

The furniture and effects of the plaintiff were afterwards packed in the defendant's van by the defendant's men. The van was taken by them by road from the plaintiff's house at Paignton to the Torquay Station of the South Devon Railway Company, where it was placed by the defendant's men upon a truck to be conveyed by rail to Plymouth. On the journey the van accidentally, and without any negligence on the defendant's part, caught fire, and the plaintiff's furniture and effects were almost entirely consumed.

To recover damages for this loss the plaintiff brought this action against the defendant, declaring against him as a common carrier, and as liable on a special contract to carry safely. The cause was tried before Lord Coleridge, C.J., at the Exeter Summer Assizes, 1874, when the above facts were proved.

It was contended by the counsel for the defendant, that upon these facts the furniture and goods had been carried under a special contract, exempting the defendant from liability as a common carrier; that there was no evidence that the defendant was a common carrier, or that he had incurred the liability of a common carrier, and that he was entitled to a nonsuit.

The learned judge declined to nonsuit, being of opinion that the defendant was not exempted from liability as a common carrier by the terms of the alleged special contract; and that there was evidence that the defendant was a common carrier, and that he had incurred the liability of a common carrier. A verdict was accordingly directed for the plaintiff for the damages claimed in the declaration, subject to reduction upon a reference to an arbitrator, if the arbitrator should think fit to reduce them, leave being reserved to the defendant to move. The defendant having, pursuant to the leave, obtained a rule nisi to enter the verdict for the defendant on the ground that upon the special contract, and other facts proved at the trial, the defendant was not a common carrier, and not liable for the loss of the furniture in question, on the 12th of February, 1875, the Court of Exchequer (Bramwell, Pollock, and

Amphlett, BB.), after argument, made this rule absolute. The ground of their judgment was that the special contract shewed the intention of the parties that the defendant should not be liable except for breakages.

The question for the opinion of the Court of appeal is, whether the rule ought to have been made absolute or discharged.

June 25. *Lopes, Q.C.*, and *Arthur Charles*, for the appellant, contended that the course of the defendant's ordinary employment was such as to make him a common carrier or liable as such, and they relied on *Liver Alkali Co.* v. *Johnson* (1) (which they said was undistinguishable from the present case), and referred to *Coggs* v. *Bernard* (2) and *Clarke* v. *Gray*. (3) They also contended that the memorandum was not intended to affect the defendant's liability except in the event of breakage, and then only in *amount*, and left him liable as a common carrier in case of fire.

Cole, Q.C., and *Pinder*, for the respondent, cited *White* v. *Great Western Ry. Co.* (4) and *Brind* v. *Dale*. (5)

Lopes, Q.C., replied.

Cur. adv. vult.

July 7. The following judgments were delivered, those of Lush and Denman, JJ., being read by Mellor, J. :—

LUSH, J. It does not appear to me necessary to decide the question which was first argued in this appeal, namely whether the defendant comes within the definition of, or whether in the ordinary course of his business he incurs the liability of, a common carrier, so as to be answerable for damage to the goods not caused by any act or default of himself or his servants. I agree with the Court below that the letters set out in this case constitute a special contract, and think that, whether without those letters the defendant would have been liable or not for the accident which happened to the goods, the terms of the contract sufficiently show that both parties understood that the risk undertaken by the defendant was of a much more limited nature. Both letters were written by the defendant, the proposal, signed by him, inclosing the answer to

(1) Law Rep. 9 Ex. 338.
(2) 1 Sm. L. C. 188, 7th ed.
(3) 6 East, 564.
(4) 2 C. B. (N.S.) 7; 26 L. J. (C.P.) 158.
(5) 8 C. & P. 207.

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be returned, and which was accordingly returned, signed by the plaintiff. The proposal is, "I beg to inform you that the terms for removal of your furniture and effects (as seen by my foreman) from Paignton to Plymouth will be 22*l.* 10*s.*, with risk of breakages in transit, including the use of all necessary mats, cases, and packing materials, and every expense. In the event of your accepting this estimate, be kind enough to sign and return to me the annexed memorandum by which I am liable to the amount therein specified," &c. The answer is in these terms, "I hereby agree to pay you the sum of 22*l.* 10*s.* for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakages (if any) not exceeding 5*l.* on any one article." Mr. *Lopes* endeavoured to read these letters as merely limiting the amount which should be payable by the defendant in the event of damage by breakage, leaving him by implication liable to the full extent for all other casualties. It is impossible, I think, to put such a construction on the letters, or to suppose that either party so understood them. The fair meaning of them is, that the defendant was willing to undertake a particular casualty and no others, and to pay up to 5*l.* for any article damaged by that casualty; and this the plaintiff must have understood to be the meaning. By that contract both parties are bound. I agree that it does not exclude liability for such damage as might result from want of due and reasonable care in the packing or the carriage of the goods; but the damage which happened was not caused by any such default, but was, as far as the defendant was concerned, purely accidental. I therefore think that the judgment should be affirmed.

MELLOR, J. I am of opinion that this judgment must be affirmed. The facts appear to me clearly to shew that the delivery of the furniture in question to the defendant was not a delivery to him as a common carrier, or as undertaking the liabilities which attach to a common carrier; but was a delivery under the special contract to be collected from the letter of the 19th of August, 1873, set out in the case, and from the memorandum indorsed thereon and signed by the defendant. I think that the meaning of the letter and memorandum is, that the defendant was willing

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to remove the furniture from Paignton to Plymouth for the sum of 22*l.* 10*s.*, he undertaking the particular risk of breakage not exceeding 5*l.* on any one article. Of course this does not exclude liability for negligence or want of reasonable care on the part of the defendant and his servants. I think that the circumstances of the case shew that the defendant undertook no other risk of casualty than that, and Mr. Lopes failed to shew that any further or more extensive liability attached to the defendant. He relied mainly upon judgment in *Liver Alkali Co.* v. *Johnson* in the Exchequer Chamber. (1) Had that case not been clearly distinguishable in its facts from the present, it would have been binding upon us, sitting as a co-ordinate Court of Appeal, and it can only be qualified or reversed by a decision of the House of Lords. For myself I decline on the present occasion to discuss the grounds upon which that case proceeded, because I think it is entirely unnecessary to do so; and I therefore confine my decision to the meaning of the special contract between the parties to which I have already referred.

My Brother Grove agrees with this judgment, and my Brother Lindley agrees with both this and the judgment of my Brother Lush.

DENMAN, J. I am of opinion that the judgment of the Court of Exchequer in this case ought to be affirmed. It was contended for the defendant, first, that the general course of his dealing did not make him a common carrier, or one who was subject to the liability of a common carrier, quâ furniture undertaken to be carried; and, secondly, that even if he might, in the absence of any special contract, have been liable as a common carrier, there was in this case such a special contract for the carriage of the furniture of the plaintiff as to exempt the defendant from the liability which, in the absence of a special contract, might possibly have been inferred. Upon the first point the plaintiff relied mainly upon the case of *Liver Alkali Co.* v. *Johnson* (1), affirmed in this Court. (1) If that case were identical in its material facts with the present I should hold myself bound by it so far as to say that, whether a common carrier or not, to all intents and purposes

(1) Law Rep. 7 Ex. 267; in Ex. Ch. Law Rep. 9 Ex. 338.

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the defendant must be held liable, as having undertaken a business imposing upon him the same liabilities as those of a common carrier. But I am of opinion that the mode of dealing adopted by the defendant in this case differs in many most important particulars from that of the defendant in *Liver Alkali Co.* v. *Johnson.* (1) In this case, though it is found "that the defendant has for several years carried on upon his own account the business or employment of a carrier, removing and carrying goods and furniture for hire for all persons indifferently who applied to him," the case adds that he conducts that business upon terms which appear upon the card annexed to the case. Upon a perusal of this card it appears to me that it contains terms which, added to the other facts found in the case in relation to the defendant's ordinary mode of doing business, negative any inference in favour of his being a common carrier, which might otherwise have arisen from the above-mentioned finding, and also negative any inference that he dealt upon such terms as to incur the liabilities of a common carrier. The card is headed "S. D. Railway Goods and Parcels Office." It describes the defendant as "sole agent," which I interpret to mean "of the S. D. Railway Company." It speaks of "furniture stored," of "vans, carts, and horses on hire," neither of which can be said to refer to the proper business of a common carrier. It then contains these words: "Large lock-up vans for removing furniture, glass, and china, &c., &c., by road or rail without packing," which is quite as consistent with the business of letting out such vans on hire as with an undertaking to use such vans as a carrier in removing the goods of others. Then at the foot of the card are the words, "Contracts entered into for removing furniture to or from any part of the kingdom; estimates given free." On the back of the card is engraved a specimen of one of the vans riding on a railway truck. The case finds that the course of business is for an inspection of the furniture to take place before any contract is made, and for the price to be fixed after such inspection. Reading the whole of the card together with the facts found, I come to the conclusion that the defendant did not so deal with the public as to undertake to carry goods in the absence of an agreement as to terms of carriage. The card

(1) Law Rep. 9 Ex. 338.

itself must, I think, be taken as a part of the defendant's mode of dealing, and the substance of it appears to me to be, not that he will carry at all events, but only that he will carry if his estimate and terms, whether as to liability or otherwise, are agreed to. In discussing these terms many things would have to be taken into account, as, for example, whether the goods were to go by road or rail, whether the van was to be under the control of the plaintiff's or the defendant's driver, whether any other person's goods are to be allowed to travel in the same van or not (for the case does not find that one van is always used for the goods of one person); and many other matters, such as route, speed, whether in van or cart, &c., the decision as to which might alter the estimate.

In *Liver Alkali Co.* v. *Johnson* (1) Kelly, C.B., says: "No doubt if each particular voyage had been made under a special contract containing stipulations applicable to that voyage only, the case would have been different." In the present case I think that the very mode of dealing pointed out in the card and stated in the case necessarily involves a special contract in each case applicable to each journey only, and that the case of *Liver Alkali Co.* v. *Johnson* (1) is very distinguishable on that ground. I think the card itself was fair notice to the world that a special contract must be made before any liability to carry would be incurred, and that it follows that any one having such notice would be bound to stipulate expressly for any such liability as that of a common carrier before he could charge the defendant as upon any such liability.

Upon the second point, viz., whether, supposing the defendant to be generally carrying on the business of a common carrier, or carrying on business so as to be generally liable as a common carrier, he was so liable in this case; or whether he had not limited his liability by reason of the letters of the 19th of August, 1873, set out in the case; I entirely agree with the view taken by Bramwell, B., in the court below. The words "you undertaking risk of breakages," though to an amount immediately afterwards limited, seem to me conclusive to shew that the relation of common

(1) Law Rep. 7 Ex. at p. 269.

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carrier to owner of goods was not contemplated by the plaintiff in the particular case, whatever might have been their relation in the absence of such a stipulation. On both grounds I am of opinion that our judgment should be for the respondent.

COCKBURN, C.J. I entirely agree in the view taken by the rest of the Court that this was a special contract, and that the question of the liability of the defendant as a common carrier could not arise. Had it not been so I should have thought myself bound to enter into the question whether the defendant was a common carrier at all, and after a careful examination of *Liver Alkali Co.* v. *Johnson* (1) and all the authorities, I think that question ought to be submitted to further consideration.

BRETT, J. I desire to say that I agree with the rest of the Court as to this being a special contract, but I also agree with what I understand to be the view of the Lord Chief Justice, that whatever might be the true effect of the judgment in *Liver Alkali Co.* v. *Johnson* (1), in this case there is no evidence at all that this person was a common carrier.

Judgment affirmed.

Attorneys for plaintiff: *Wedlake & Letts, for J. & R. G. Edmonds, Plymouth.*

Attorney for defendant: *G. Davis.*

(1) Law Rep. 9 Ex. 338.

RICHARDSON AND ANOTHER *v.* WRIGHT.
W. H. WRIGHT, CLAIMANT.

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July 7.

County Court Act, 1867 (30 & 31 *Vict. c.* 142), *rr.* 174–180—*Interpleader—Particular of Goods claimed—Insufficient description.*

By rule 174 of the County Court Act, 1867, the claimant in an interpleader is required, five clear days before the day appointed for hearing the summons, to deliver to the bailiff or leave at the office of the registrar a particular of the goods alleged to be his property, and also the grounds of his claim.

Goods and money which had been seized under an execution upon a county court judgment were claimed by W., who delivered to the registrar a particular describing them as "the goods and money seized by virtue of the warrant." In the grounds of claim it was stated that the goods were the property of the claimant, and were at the time of the seizure in his possession. This particular was held insufficient by the judge, who refused to go further into the case, and made an order in favour of the execution creditors with costs.

Upon a rule calling upon the execution creditors and judge to shew cause why the judge should not hear and adjudicate upon the claim:—

Held, by Kelly, C.B., and Amphlett, B., that the particular was sufficient; by Bramwell and Cleasby, BB., that it was insufficient.

RULE calling upon the plaintiffs and the judge of the County Court of Kent to shew cause why the judge should not hear and adjudicate upon a claim made to certain goods taken in execution under a judgment of the county court. The facts and arguments appear in the judgments.

June 10. *Francis* shewed cause, and cited *Reg.* v. *Stapylton.* (1)

E. Thomas, in support of the rule, cited *Reg.* v. *Richards* (2); *Churchward* v. *Coleman* (3); *Heslop* v. *M'George* (4); *Whitehead* v. *Procter.* (5)

Cur. adv. vult.

July 7. The following judgments were delivered.

CLEASBY, B. This was a rule granted under 19 & 20 Vict. c. 108, s. 43, calling upon the plaintiffs in the cause and the judge of the County Court of Kent, holden at Margate, to shew cause why the judge should not hear and adjudicate upon a claim made to certain goods taken in execution.

(1) E. L. M. & P. 603; 21 L. J. (Q.B.) 8.
(2) L. M. & P. 263; 20 L. J. (Q.B.) 351.
(3) Law Rep. 2 Q. B. 18.
(4) 18 L. T. 109.
(5) 3 H. & N. 532.

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The application was made on behalf of William Horace Wright, the claimant in an interpleader. Certain goods and money had been seized under an execution issued upon a judgment of the county court, and these were claimed in the usual way by a notice that the goods and money seized were the property of the claimant.

The practice of the county courts in interpleader cases is regulated by certain rules and forms which, when duly made, are in force by virtue of the Act 19 & 20 Vict. c. 108, s. 32.

The rules now in force are rules Nos. 174 to 180 of the rules issued in 1867. By rule 174 the claimant is bound, five clear days before the day appointed for the hearing the interpleader summons, to leave with the registrar a particular of the goods alleged to be his property, and also the grounds of his claim.

The importance of this rule, which is in the same terms as the rule in force previously, is obvious. It is to make it certain with respect to what goods the decision of the judge is to operate, or there might be many disputes afterwards; and also to let the execution creditor know what particular goods are claimed, and also what are the grounds of the claim, so that he may be prepared at the hearing to meet the case in whole or in part.

In the present case it appears that the summons was originally returnable on the 22nd of October. On that day no particular whatever had been left in compliance with rule 174, and the claimant could not be heard. It is probable he thought he might rely upon the original notice that he claimed the goods. The judge, however, adjourned the case to the next court day, the 12th of November. On that day a notice had been left which the judge thought insufficient, and he adjourned the case to the next court day, the 10th of December, to allow an amended notice to be delivered.

On the 10th of December, when the summons was called on, no further notice had been delivered, and the judge further adjourned the case to the 14th of January, making a peremptory order that if proper notice was not delivered the summons would be struck out.

On the 26th of December a notice was left in a form annexed to the affidavit, and on the 14th of January, the court day, the attorney for the claimant did not appear, and the judge made an

order in favour of the execution creditors with costs, but he ordered the money not to be paid out until after the next court day, reserving liberty to the claimant to apply.

On the next court day, the 11th of February, the attorney for the claimant appeared, and on his application to have the case re-heard, the judge granted his application on the terms of his paying 10*l.* into court as security for costs.

The hearing was then adjourned by consent to the 15th of April.

On the 10th of April a particular of the goods claimed, and of the grounds of claim, was delivered.

This particular was the subject of the judge's decision, and is annexed to the affidavit of Mr. Dorman, the attorney for the plaintiffs. By it the attorney for the claimant claims "the goods and money seized by virtue of the warrant," and the ground alleged is that they were the property of the claimant, having been purchased by him from one Moore on the 1st of July, and at the time of the seizure being in possession of the claimant, and never having been the property of the defendant.

The statement of facts is taken from the affidavit of the attorney for the plaintiffs. There is no dispute as to the form of the particular actually given, and the facts are stated to account for the delay from the 22nd of October to the 10th of April.

Under these circumstances, upon the objection of the execution creditors to the sufficiency of the particular, the judge held it insufficient, and refused to go into the case further, making an order in favour of the execution creditors, with costs.

It appears to me that the judge was justified in the conclusion which he arrived at, and that we ought not to order him to hear the case any further. The objection was to the particular of the goods claimed, and not to the grounds of claim. I think that the only particular of the goods claimed being that they were seized, it was quite competent for the judge to decide that this particular, under the circumstances of the case before him, was insufficient both for his own adjudication and for the information of the execution creditors. If the execution creditor lives at a distance it gives him no particular at all, but only lets him know how he may get one, namely, by going to the sheriff.

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The statement at the end of the grounds of claim that the goods and money were in the possession of the claimant gave no real information, and possibly the doubtful question which he would have to determine would be in whose possession they were.

The money claimed was 3*l.*, taken out of the till of an hotel, of which the defendant in the action was the licensed proprietor, and therefore the question would arise in whose possession the concern really was.

It was represented on the part of the claimant that the judge had required as accompanying the notice some schedule or inventory of the goods claimed. If the particular had been that the claim was of all the household furniture and trade utensils, &c., in the hotel at the time of seizure, I should have thought it unreasonable in the judge to require that these should be all scheduled in detail, but the subject of the decision was the actual notice which there had been so many adjournments to rectify, and as to this I think he was well warranted in his conclusion.

We were referred to several authorities in which the Court of Queen's Bench had directed the county court judge to proceed and hear such cases where they thought the judge had erroneously decided as to the sufficiency of the particulars: *Reg.* v. *Richards*(1); *Churchward* v. *Coleman.* (2) In the first of these cases the goods were described in detail, and the objection was to the sufficiency of the grounds of claim.

In the second case the only objection was to the ground of claim, the particulars of the goods claimed being sufficient, viz. the goods, chattels, and effects in and about the house of the defendant situated at North Camp.

The Court of Queen's Bench in both cases thought there was a sufficient statement of the ground of claim as well as of the goods claimed, and ordered the judge to hear the case.

If a similar description had been given in the present case to that given in the case last referred to, I should have thought it, under the circumstances, sufficient though general, but I think, the only description being that they were the goods seized in execution, this might well be considered insufficient.

I therefore think there is no sufficient ground for directing the

(1) L. M. & P. 265; 20 L. J. (Q.B.) 351. (2) Law Rep. 2 Q. B. 18.

judge to hear this case further, and that the rule ought to be discharged.

I must say, for myself, that when a county court judge has really heard and disposed of the question of sufficiency of particulars, which is, I conceive, a matter properly before him for decision, though in some sense of a preliminary character, I should not feel myself justified in hearing that question discussed upon affidavits with a view to overruling his decision. The practice and procedure of the county courts are regulated in this and other matters by certain rules and forms which have the sanction of an Act of Parliament. It is the duty of the county court judges to administer justice in conformity with those rules and forms, but it is really most inconvenient, not to say more, for the superior courts, except where jurisdiction is given them, to entertain the question how far those rules and forms have been complied with.

I should not depart from authorities when they were in point, but only yield to them. If the case was sent to the judge again the same question would be raised, and how could he decide it except upon his judgment, having jurisdiction without the advantage of correction on appeal.

I think the rule must be discharged.

BRAMWELL, B. I am of the same opinion.

AMPHLETT, B. Two points were argued before us against the rule. First, it was said that this Court had no jurisdiction to interfere with the decision of the county court judge upon the sufficiency of the particular of claim. The contrary has, however, been settled by authorities which were cited on the argument, and which in my judgment we are bound to follow: *Reg.* v. *Richards* (1); *Churchward* v. *Coleman* (2); *Whitehead* v. *Procter*. (3)

But, secondly, it was said that the county court judge was right in holding the particular of claim insufficient. I am not, however, of that opinion. The object of requiring particulars appears to be that the execution creditor may know what case he has to meet, and when he is told that the claim extends to the whole of

(1) L. M. & P. 263; 20 L. J. (Q.B.) 351. (2) Law Rep. 2 Q. B. 18.
(3) 3 H. & N. 352.

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the goods seized by the sheriff, what useful purpose can be answered by compelling the claimant to go to the expense and trouble of furnishing an inventory or further description? It may well be when the goods seized are the furniture, for instance, of a large hotel, that the expense of an inventory would be much more than the execution creditor's debt.

In *Churchward* v. *Coleman* (1), above referred to, a notice claiming the goods in and about the house and premises of the defendant seized under the execution, was held sufficient without further describing the goods. But then it was argued that in the present case the particular is insufficient because it does not specify the hotel in which the goods were. But who could have been misled by the omission? There was no question about any other goods but those in the hotel.

The sheriff came to the county court for protection, and would naturally state, and was, in my opinion, the proper person to state, what it was he had seized, and in respect of which he claimed protection, and the whole litigation would proceed upon the footing of that statement.

Moreover, it is quite clear from the course of the argument before us and the proceedings before the county court judge that the simple omission of the place where the goods were seized was not the ground of the judge's decision; if it had been, he would no doubt in furtherance of justice have suggested the necessary amendment, which might have been done by a few strokes of the pen.

Being of opinion, therefore, that the particular of claim gave the execution creditor all the information that would have been of the slightest use to him, I think that the requirements of the 174th rule were substantially complied with, and that the county court judge ought to have adjudicated on the claim on its merits.

KELLY, C.B. The first question is whether we are entitled to overrule the decision of the county court judge as to the sufficiency of these particulars, and I need only say that we have been referred to two cases in which the Court of Queen's Bench has exercised such a right.

(1) Law Rep. 2 Q. B. 18.

The question as to the sufficiency of the particulars themselves is not of much importance, as each case must be decided on its particular circumstances; but I own that but for the opinion entertained by my Brothers Bramwell and Cleasby, I should have thought the case too clear for argument. It appears that an execution had been put into an hotel. We are not informed—the affidavits, to say the least, are obscure, if not entirely silent, as to what took place on the occasion of the seizure. Whether anything more took place than the bailiff going in and saying that he came to levy, and then immediately and without more leaving the place, is at least questionable.

Under these circumstances, the question arises whether the particulars are sufficient. I own, after minute attention, that I am at a loss to imagine how it was humanly possible for the claimant to give any other or better particulars than he gave. I have no means of knowing what articles were seized, but the county court judge seems to have required that the claimant should give something like an inventory of the goods which he claimed. Now, inasmuch as no one seems to have been in a position to say what articles were seized, what particulars could the claimant give except these, "Whatever goods you have seized, those I claim?" The rule requires that the claimant shall give a particular of the goods which he claims, but this law must receive a reasonable construction, and what can be suggested that he should say, except, "I don't know what goods you have seized, but whatever they are I claim them?" It has been contended that he might have said, "All the goods in the hotel." But why? It might turn out that some of the goods in the hotel did not belong to him, though the goods which were seized were his property. However, as my Brothers Bramwell and Cleasby are of a different opinion, the rule will drop.

Rule dropped.

Attorneys for the execution creditors: *Kingsford & Dorman, for Sankey & Co., Margate.*

Attorney for claimant: *J. C. Allen.*

END OF TRINITY TERM, 1875.

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CHEQUE FOR PRE-EXISTING DEBT—*Negotiable Security payable on Demand.*] The title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him bonâ fide and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand.—Judgment of the Court below affirmed (Lord Coleridge, C.J., dissenting). Currie *v.* Misa - - - - 200

CLERK OF JUSTICES—Fees—Penal action [Ex. Ch. 86
See Common Informer.

COLLECTION OF WATER—Vis major - 255
See Duty of Owner of Land.

"**COMMON CARRIER**"—*Carrier by Land—Contracts to carry Furniture.*] The defendant was the agent of a railway company for collecting and delivering goods and parcels, and also carried on upon his own account the business of a carrier, removing goods and furniture for hire for all persons indifferently who applied to him, in his own vans, which he sent by road or rail to all parts of England, the goods and furniture being previously inspected before any contract was made. Generally in such contracts the van or vans were hired by and filled with the goods of one person only. The plaintiff having applied to the defendant to remove his furniture from one town to another, and the defendant's foreman having inspected it, the parties agreed that the defendant should remove the furniture for 22*l.* 10*s.*, the defendant "undertaking risk of breakage (if any) not exceeding 5*l.* on any one article." After the furniture was placed in the defendant's vans, and while in transit, it was burnt without any negligence on the defendant's part. The plaintiff having brought an action for the loss, contended that the defendant was liable as a common carrier:—*Held* (affirming the judgment of the Court below), that the special contract shewed that the parties intended to limit the defendant's liability to loss by breakage or by the defendant's negligence, and excluded any question of liability as a common carrier; and that the plaintiff could not recover. Scaife *v.* Farrant - Ex. Ch. 358

COMMON INFORMER—*Penal Action—Clerk of Justices—Taking Fee other than that in authorized Table*—26 *Geo.* 2, *c.* 14—*Table of Fees not made at Sessions next after June*, 1753—*Venue, when local—Action as Informer by Person grieved*—31 *Eliz. c.* 5—21 *Jac.* 1, *c.* 4.] In an action under 26 Geo. 2, c. 14, s. 2, to recover penalties against a clerk of justices for taking a fee higher than that in the authorized table, the venue is local, under 31 Eliz. c. 5, though the plaintiff happen to be the person grieved. Declaration (venue Middlesex) that a table of fees to be taken by the clerks of justices for Monmouthshire directing that the fee to be taken for every recognizance to prosecute, &c., should be 4*s.*, was, pursuant to 26 Geo. 2, c. 14, made and settled by the justices at quarter sessions, approved at the quarter sessions next succeeding, and afterwards laid before the judges at the next assizes, who, on November the 15th, 1842, approved and ratified the same, and that three months afterwards the defendant, as clerk to the justices, demanded and received

COMMON INFORMER—*continued.*
of the plaintiff 8s., as the fee for taking and acknowledging a recognizance, whereby, and by force of the statute, the defendant became liable to pay the plaintiff 20*l.*:—*Held*, on demurrer, that the declaration was bad, as the Act 26 Geo. 2, c. 14, s. 2, in imposing a penalty of 20*l.* for demanding a greater fee than that established, enabled any person to sue as informer, and the plaintiff sued as informer, though he happened also to be the person grieved.—By 26 Geo. 2, c. 14, s. 1, "the justices of the peace throughout England, at their respective general quarter sessions of the peace, to be held next after the 24th day of June, 1753, shall and they are required to make and settle a table of fees, &c. And it shall and may be lawful for the said justices in their respective quarter sessions assembled from time to time to make any other table of fees to be taken instead of the fees contained in the table."—*Semble*, per Blackburn, Mellor, and Archibald, JJ., that the power to make a fresh table of fees does not depend upon a previous table having been made at the session next after June, 1753. Lewis *v.* Davis - - - **Ex. Ch. 86**

CONTRACT—Alteration - - - **330**
See Alteration in Written Contract.

—— Plans and specification - **Ex. Ch. 112**
See Implied Warranty.

—— Sale—Property passing - - **274**
See Property in Goods.

CONTRIBUTORY NEGLIGENCE—Identification of passenger with driver - - **47**
See Evidence of Negligence. 2.

—— Railway bridge - - **Ex. Ch. 100**
See Evidence of Negligence. 3.

CORPORATION—Foreign—Income tax - **20**
See Income Tax.

—— Trespass—Liability of corporation
See Highway Board. [**Ex. Ch. 92**

COSTS—County Court jurisdiction—Admiralty
See County Court Jurisdiction. [**65**

—— Ejectment—Judgment by consent - **210**
See Costs in Ejectment.

—— Recovery—Measure of damage **Ex. Ch. 35**
See Remoteness of Damage.

COSTS IN EJECTMENT—*Practice—Ejectment—Costs on Judgment for Plaintiff by Consent.*] When the real defendant in an action of ejectment appears and consents that the plaintiff shall sign judgment, the plaintiff is entitled to costs, though the case is not specifically provided for by the Common Law Procedure Act, 1852. Dalbiac *v.* Delacourt - - - - **210**

COUNTY COURT—Interpleader—Particulars **367**
See Particulars in County Court.

—— Special bailiff - - - - **220**
See Special Bailiff.

COUNTY COURT JURISDICTION—*Admiralty Jurisdiction—Demurrage*—31 & 32 *Vict. c.* 71—32 & 33 *Vict. c.* 51, *s.* 2—*Construction of Statutes—Costs.*] A claim for demurrage is not within the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, which only gives jurisdiction to county courts to try and determine causes which are within the jurisdiction of the Admiralty Court. *Simpson v. Blues* (Law Rep. 7 C. P. 290) approved. *Cargo ex Argos* (Law Rep. 5 P. C. 134) dissented from. Gunnestead *v.* Price. Fullmore *v.* Wait **65**

COUNTY COURT RULES—Rules 174–180 - **367**
See Particulars in County Court.

DAMAGES—Personal injury—Insurance - **1**
See Damages for Personal Injury.

—— Remoteness—Costs of litigation **Ex. Ch. 35**
See Remoteness of Damage.

—— Sale of goods—Monthly instalments **Ex. Ch. 195**
See Damages on Contract of Sale.

DAMAGES FOR PERSONAL INJURY—*Negligence—Railway Company—Insurance—Damages.*] In an action for injuries caused by defendants' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages. Bradburn *v.* The Great Western Railway Company - **1**

DAMAGES ON CONTRACT OF SALE—*Sale of Goods—Delivery by Instalments—Monthly Deliveries—Forbearance of Vendor at Request of Vendee.*] The defendants in October, 1870, contracted to sell to the plaintiffs 2000 tons of iron "delivery in monthly quantities [of 166⅔ tons] over 1871, or sooner if required;" payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2000 tons. The defendants refused it, and denied that they were liable to deliver any more iron under the contract, except what was due on the monthly balance. The plaintiffs then brought an action for non-delivery.—The majority of the Court of Exchequer (Kelly, C.B., and Pigott, B.) held that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2000 tons in December, and were therefore not entitled to recover; but Martin, B., dissenting, held that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2000 tons under their contract:—*Held*, by the Exchequer Chamber, reversing the judgment of the Court below, that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the 2000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action. Tyers *v.* The Rosedale and Ferryhill Iron Company, Limited - - - **Ex. Ch. 195**

DEATH OF PLAINTIFF—*Practice—Death of Plaintiff after Nonsuit—Abatement of Action—Right of Defendant to enter Judgment nunc pro tunc—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 139—*Rule* 56 *of Hilary Term*, 1853.] In an action against the defendant for negligently allowing an area to remain open in a highway, whereby the plaintiff (an infant, suing by next friend) was injured, the case was tried after term, and a nonsuit directed, on the ground that there was no evidence of negligence; the judge staying execution to enable the plaintiff to move to set aside the nonsuit. During the vacation the plaintiff died. In the following term, the plaintiff's next friend obtained a rule nisi to set aside the nonsuit, on the ground that there was evidence of negligence, and the defendant a rule nisi to tax his costs, or why the Court should not allow judgment to be signed for him nunc pro tunc:—*Held*, that the action having abated by the plaintiff's death, a motion to set aside the nonsuit could not be entertained. As, however, the judge by staying execution had intimated that he regarded the question as to the defendant's liability a doubtful one, judgment nunc pro tunc ought not to be entered for the defendant. The defendant's rule must be discharged, without costs, and the plaintiff's rule allowed to drop. Hemming *v.* Batchelor - - - 54

DEED—Habendum—Construction - - 270
See Grant in Futuro.

DEMURRAGE—County Courts' Jurisdiction 65
See County Court Jurisdiction.

—— Lien—Cesser of Charterer's liability 132
See Cesser of Charterer's Liability.

DESCRIPTION—Bill of sale—Affidavit - 64
See Affidavit with Bill of Sale.

DISCHARGE OF SURETY—*Principal and Surety—Liquidation by Arrangement—Bankruptcy Act*, 1869, *s.* 125—*Effect of absolute Discharge of principal Debtor.*] Where a principal debtor is discharged by a resolution under s. 125 of the Bankruptcy Act, 1869, his surety remains liable in the same manner as in an ordinary bankruptcy, although the resolution contains no reservation of rights against sureties. Ellis *v.* Wilmot 10

DISTRESS—Action for rent - - - 242
See Action pending Distress.

DISTRICT SURVEYOR—Trespass—Liability
See Highway Board. [Ex. Ch. 92

DIVERSION OF WATER—The defendants, owners of a canal, being threatened by an overflow of flood water from a neighbouring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises, which were also situated on the banks of the canal above the premises of the defendants, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiff's premises. In an action brought to recover damages for the injury so caused:—*Held*, that the defendants were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it. Nield *v.* The London and North Western Railway Company 4

DIVERSION OF WATER—*continued.*

2. *Easement—Water—Natural and Artificial Stream—Riparian Owner.*] A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell; the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface, and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood, and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867 he conveyed the mill, with all water rights, to the plaintiff.—In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of the water:—*Held* (affirming the judgment of the Court below), that the plaintiff was entitled to maintain the action. Holker *v.* Porritt [Ex. Ch. 59

DUTY OF OWNER OF LAND—*Water stored—Water overflowing from Defendant's Land to Plaintiff's Land—Floods—Extraordinary Rainfall—Vis Major—Act of God.*] One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for the escape of the water which injures his neighbour, if the escape be caused by an agent beyond his control, such as a storm, which amounts to vis major, or the act of God, in the sense that it is practically, though not physically, impossible to resist it.—On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up with artificial embankments a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell so that the artificial embankments were carried away by the pressure, and the water in the pools, being thus suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall was most excessive, and amounted to vis major:—*Held*, that the action was not maintainable. *Rylands* v. *Fletcher* (Law Rep. 3 H. L. 330) distinguished. Nichols *v.* Marsland - - - - - 255

EJECTMENT—Judgment by Consent—Costs
See Costs in Ejectment. [210

ENGINEERING CONTRACT—Plans and Specifications - - - Ex. Ch. 112
See Implied Warranty.

ERASURE—Written Contract - - 330
See Alteration in Written Contract.

EVIDENCE—Agency—Sale of Goods—Note in Writing - - - - 126
See Frauds, Statute of. 1.

EVIDENCE OF NEGLIGENCE—*Trespass to the Person—Driving unmanageable Horses in the Public Highway—Accidental Injury—Vis Major—Master and Servant.*] To maintain an action for injury to the person the injurious act must be wilful or the result of negligence.—The defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside his servant, was requested by him not to interfere with the driving, and complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one:—*Held*, that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards the plaintiff was not a wrongful act.—*Quære*, whether, if an action would have lain against the servant, it would also have lain against the defendant. Holmes *v.* Mather - - - - - 261

2. —— *Negligence—Collision between Railway Carriages—Identification of Passenger with his Driver—Joint Wrong-doers.*] The plaintiff, one of the travelling inspectors of the carriage and waggon department of the L. and N. W. Railway Company, was travelling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. station, and on the line of the defendants, over which the L. and N. W. Railway had running powers, the train in which the plaintiff was travelling came into collision with a number of loaded waggons which were being shunted from a siding by the defendants, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train in travelling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by the defendants. The jury found that the accident was caused by the joint negligence of the defendants and the L. and N. W. Railway Company:—*Held*, approving of the decision in *Thorogood* v. *Bryan* (8 C. B. 115), that the plaintiff was so far identified with the L. and N. W. Railway Company that he could not recover: *Semble*, that the evidence did not support the finding of the jury with regard to the defendants, but shewed that the L. and N. W. Railway were solely responsible for the accident. Armstrong *v.* The Lancashire and Yorkshire Railway Company - - 47

3. —— *Contributory Negligence — Railway Bridge.*] The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was

EVIDENCE OF NEGLIGENCE—*continued.*
crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' empty trucks from their line, the plaintiffs removing them as they thought fit. The defendants were accustomed to bring such empty trucks along their main line at any hour by day or night, and, without notice to the plaintiffs, to shunt such trucks on to the siding and leave them there to be disposed of by the plaintiffs. One Saturday evening, after working hours, the defendants brought on to the plaintiffs' siding and left there trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at the plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs which pushed the loaded truck up to the bridge, by which means the further progress of the train of trucks was checked. The engine-driver, believing that the obstruction was caused by a break, drew back the engine, and gave with it such a push to the train that the loaded truck knocked down the bridge. In an action for the damage so done, the jury found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck:—*Held*, by the majority of the Exchequer Chamber (Denman, J., dissenting), reversing the decision of the Court of Exchequer, that there was evidence of contributory negligence to go to the jury. Radley *v.* The London and North Western Railway Company - - - - Ex. Ch. 100

FIAT OF ATTORNEY GENERAL—Writ of Error
See Petty Bag Office. [213

FIXTURES—*Landlord and Tenant—Trustee in Liquidation.*] A lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be "cleared" by the purchaser in two days from the sale. The plaintiff bought the fixtures; but, with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, and the trustee surrendered the premises to the landlord, who re-let them, the fixtures still remaining affixed. About a fortnight afterwards the plaintiff, learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between the plaintiff and a person claiming title through the new tenant:—*Held*, that the plaintiff had not lost his right by delay or laches, and that he was entitled to the fixtures. Saint *v.* Pilley - - - - - 137

FORBEARANCE TO DELIVER GOODS—Request of Vendee - - - Ex. Ch. 195
See Damages on Contract of Sale.

FOREIGN BONDS—Negotiability 76, Ex. Ch. 337
See Negotiable Instrument.

FOREIGN CORPORATION—Income tax - 20
See Income Tax.

FOREIGN SHIP—Negotiability 76, Ex. Ch. 337
See Negotiable Instrument.

FORGED INDORSEMENT—Cheque - 183
See Treasurer to Guardians.

FRAUDS, STATUTE OF—29 *Car.* 2. *c.* 3, *s.* 17—*Sale of Goods—Memorandum signed by Agent—Evidence of Agency.*] In an action to recover the price of clocks sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller when he took the order for the goods wrote out in the presence of the defendant upon printed forms two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it:—*Held* (distinguishing *Durrell* v. *Evans* (1 H. & C. 174; 31 L. J. (Ex.) 337)), that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant, so as to bind him within s. 17 of the Statute of Frauds. Murphy *v.* Boese - 126

2. —— 29 *Car.* 2, *c.* 3, *s.* 4—*Variation by Parol of Terms of Written Contract—Executory Agreement.*] The plaintiffs entered into an agreement in writing with the defendant, to let him a public-house as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years, upon the terms, amongst others, that if he sold such lease for more than 1200*l.* he should give the plaintiffs half the difference. The plaintiffs having granted him a lease of the house, which he sold for 2500*l.*, brought an action against him upon the agreement to recover one-half of 1300*l.* The defendant contended that the lease to him was granted under a substituted agreement, which was not in writing so as to satisfy the Statute of Frauds. The lease granted differed from that specified in the written agreement in the following particulars: The term was for thirty-two years, instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1200*l.* There was also no covenant against assignment without the lessor's consent, nor one binding the lessee to take his beer from the plaintiffs, as in the original agreement. These differences were the result of objections by the defendant, yielded to by the plaintiffs, who on their part required the additional rent. The jury found, however, that the stipulation as to dividing the profit remained in force or was renewed:—*Held*, that the defendant was entitled to judgment, as there was a new agreement, which ought to have been in writing to satisfy the Statute of Frauds.—*Semble*, per Amphlett, B., that if there had been anything in writing to shew that the lease granted was accepted in substitution for that originally stipulated for, the action might have been maintained. Sanderson *v.* Graves - 234

FURNITURE – Contract to carry Ex. Ch. 358
See Common Carrier.

GRANT—Construction—Habendum - 270
See Grant in futuro.

GRANT IN FUTURO—*Grant—Freehold Estate to take Effect in futuro — Habendum controlled by Express Grant in Premises—Construction.*] R. was tenant for life of a house and premises, of which (subject to his life) he had made two leases, a lease expiring on the 13th of November, 1864, and a lease to J. expiring on the 13th of November, 1874.—On the 10th of November, 1864, R. executed a deed, by which, in consideration of a yearly rent of 50*l.* he granted and leased the property to J., his executors, administrators, and

GRANT IN FUTURO—*continued.*
assigns, habendum from the 13th of November "for the term of R. for the term of his natural life":—*Held*, that this deed was not void on the ground that it purported to create a future estate of freehold, as there was in the premises of the instrument an express grant of the life estate in præsenti, which was not controlled by the habendum. Boddington *v.* Robinson - - 270

HABENDUM—Grant—Construction - 270
See Grant in futuro.

HERIOT—*Heriot Custom—Statute of Limitations —3 & 4 Wm. 4, c. 27, ss. 1, 2, 3, 34, 42.*] To an action of trespass for seizing and taking a horse, the defendant pleaded an immemorial custom for the lord of the manor, upon the death of a free tenant, to seize the best beast of which the tenant died possessed, wherever it could be found, and that in 1873, on the death of a tenant, the defendant, as lord of the manor, took the horse under this custom. Replication, that more than twenty years before the heriot in question became due, a heriot became due, for which the then lord of the manor, through whom the defendant claims, did not seize, though he could have done so; that the then lord, whilst entitled, discontinued the taking of heriots; that no heriot had since been taken until the trespass complained of; that the right to make an entry or distress or bring an action to recover heriots, at the time of such discontinuance then first accrued to the then lord within 3 & 4 Wm. 4, c. 27; and that such right so first accrued more than twenty years before the death of the tenant or the trespass complained of. On demurrer:—*Held*, that the replication was bad, since the seizure by the defendant was not making an entry or distress, nor bringing an action to recover rent within the meaning of 3 & 4 Wm. 4, c. 27, ss. 2, 3, and 34, and that the defendant's title to heriots therefore was not barred by the lapse of twenty years.—*Quære*, whether, notwithstanding the interpretation of "rent" in s. 1, heriot service and heriot custom, or either of them, are within the enactments of ss. 2, 3, 34, and 42. Lord Zouche *v.* Dalbiac - - - 172

HIGH BAILIFF — Warrant against — Special bailiffs - - - - 222
See Special Bailiff.

HIGHWAY BOARD—*Trespass—Individual Corporators—District Surveyor—Personal Liability—5 & 6 Wm. 4, c. 55, 25 & 26 Vict. c. 61.*] At a meeting of the members of a highway board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across it. The surveyor of the board was afterwards ordered by them to remove the lock, and did so. On the trial of an action of trespass brought by the plaintiff against the members of the board in their personal capacity and the surveyor, in which the defendants justified, Kelly, C.B., nonsuited the plaintiff on the ground that neither the members of the board nor the surveyor were liable individually. No evidence was therefore given in support of the plea of justification. The Court of Exchequer (Kelly, C.B., dissenting) having set aside the nonsuit and ordered a new trial on the ground, first,

HIGHWAY BOARD—*continued.*
that assuming that the resolution was illegal the members of the board who concurred in it were personally responsible; secondly, that the fact that the surveyor was, by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board, did not excuse him if in obeying their orders he did an unlawful act:—*Held*, by the Exchequer Chamber (expressing no opinion as to the liability of the members of the board), that the surveyor was liable, and that the judgment setting aside the nonsuit must therefore be affirmed. Mill *v.* Hawker and Wickett - - Ex. Ch. 92

IDENTIFICATION OF PASSENGER WITH DRIVER—Negligence - - 47
See Evidence of Negligence. 2.

IMPLIED WARRANTY—*Engineering Contract—Plans and Specification—Mode of Construction—Impossibility of Execution in Mode specified—Implied Covenants.*] The defendants being about to construct a bridge across a tidal river, employed an engineer for the execution of the works, and specifications and plans and drawings of such works were prepared by him. The defendants then issued an advertisement inviting tenders for the execution of the works comprised in the specifications, plans, &c. By the specifications the foundations of the piers were to be put in by means of caissons, as shewn in a drawing; the form and dimensions of the ironwork and size of rivets to be as shewn on the drawing, or to be thereafter supplied by the engineer, &c. By the deed, after reciting the specifications and tenders, the plaintiff covenanted that he would complete the work, according to the terms of the specifications, within three years. Power was given to the defendants' engineer to alter the mode of executing the work, and it was provided that if additional expense was incurred by such alteration, the plaintiff was to receive compensation, to be fixed by the engineer.—The plaintiff commenced the work, and after he had incurred great expense, it was found that the work could not be executed by means of the caissons in the manner specified, and by the directions of the engineer a new mode of putting in the foundations was carried out. The plaintiff having brought an action to recover the value of the work which was thereby thrown away:—*Held*, by the Exchequer Chamber (affirming the decision of the Court below), that no warranty by the defendants that the work could be executed in the manner described in the plans and specifications, was to be implied.—Per Blackburn and Mellor, JJ., that the mode of laying the foundation by means of caissons was not part of the contract, but only a mode of carrying it out, which the engineer had power to alter.—Per Brett, J., that this mode of laying the foundations was a substantive part of the contract, and that the plaintiff could only be required to pursue a different mode under a new contract. Thorn *v.* Mayor, &c. of the City of London Ex. Ch. 112

INCOME TAX—"*Person residing within the United Kingdom*"—*Foreign Corporation*—16 & 17 *Vict. c.* 34, *s.* 2, *sch. D.*] The Imperial Ottoman Bank was a corporation created by Turkish law. Its seat was fixed, by the concession and the

INCOME TAX—*continued.*
statutes which constituted it, at Constantinople, with power to establish branches and agencies at other places. It was the state bank of Turkey, where it was a bank of issue, and was charged with the collection of the revenue, and with certain operations relating to the currency, and with the payment of interest on the public debt, and received from the state a subsidy on account of the public business transacted by it.—On its creation it took over and continued to carry on the business of an English bank in London; and since its creation in 1863, the annual meetings of shareholders had always been held, and dividends declared, in London, though by its statutes the annual meetings might be held at any place which the committee of management might fix;—*Held*, that the bank was not liable to be assessed to income tax in respect of its whole profits, as a "person residing within the United Kingdom" under the 1st clause of schedule D to s. 2 of 16 & 17 Vict. s. 34; but was liable only in respect of the profits arising from its business carried on in England, under the 2nd clause of the schedule. The Attorney General *v.* Alexander - - - - - - 20

INDORSEMENT—Forgery—Banker - 183
See Treasurer to Guardians.

INHABITED HOUSE DUTY—*Inland Revenue—Dwelling House divided into distinct Tenements*—48 *Geo.* 3, *c.* 55, *sch. B, rules* 6, 14—*Valuation List—Valuation* (*Metropolis*) *Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 45, 76.] The Westminster Chambers in the metropolis belong to an association and consist of several blocks of building. Each block is divided into two ranges by an internal staircase having only one door at the principal or street entrance, and is in its internal arrangement structurally divided into different tenements or suites of rooms, which, like chambers in the Inns of Court, are quite distinct from and have no means of communication with each other, except that each has an open door opening on to the common staircase. The street door is locked at night, and a porter, appointed and removeable by the association, resides in a distinct suite of rooms in the basement of the block, and has a key of and access to each of the suites of rooms for general superintendence, and as the tenant's servant. The association have power by statute to demise or sell any suite separately. Some of the suites have never been let, but most are let as chambers, offices, or residences, to tenants for a term, at yearly rents, payable quarterly, under written agreements, which contain clauses more than usually stringent on the tenants as to repairs and mode of occupation. The association provide gas for the staircases, halls, and passages, and water for the entire building, and pay rates and taxes, charging the tenants higher rents in consequence. The tenants have the right to the services of the porter upon certain terms. In the valuation list prepared under the Valuation (Metropolis) Act, 1869, each suite of rooms is treated as a separate hereditament, the respective tenants thereof being separately assessed to the poor-rate as the occupiers; and the Court of Queen's Bench decided that for the poor-rate the suites were rightly treated as separate heredita-

INHABITED HOUSE DUTY—*continued.*
ments:—*Held*, by the majority of the Court (Bramwell and Cleasby, BB.), that for the purpose of the inhabited house duty, rule 6 of 48 Geo. 3, c. 55, sch. B, applied, and that the association must be assessed as occupiers of each block treated as one dwelling house; and that the respective tenants of the different suites must not be assessed as occupiers of distinct properties under rule 14.—*Held*, also, that the value of each block was properly represented by the aggregate sum of the values appearing in the valuation list, although, owing to some of the suites being unlet and producing no rent, the valuation list did not correctly represent the annual value to the association.—Contrà, per Kelly, C.B., that for the purpose of the inhabited house duty rule 14 applied, and that the respective tenants of the different suites must be assessed as occupiers of distinct properties. ATTORNEY GENERAL *v.* MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION - - - - - 305

2. —— *Inland Revenue—Exemption in Favour of Buildings occupied for Trade only—Parts of Buildings occupied for Trade—57 Geo.* 3, *c.* 25, *s.* 1—32 *&* 33 *Vict. c.* 14, *s.* 11.] The premises known as Weaver's Hall, in the city of London, were occupied by accountants, solicitors and scriveners, merchants, a wine shipper, and a shorthand writer, all of whom used their respective rooms as offices, and by the housekeeper and his family who resided in the top story rent free. The premises having been assessed to the inhabited house duty, the commissioners discharged the assessment on the ground that the premises were entitled to the exemption granted by 32 & 33 Vict. c. 14, s. 11, since the greater portion of them was occupied for the purposes of trade:—*Held*, on appeal, that the premises were not exempt on that ground.—*Held*, also, by Bramwell and Cleasby, BB., that in assessing the premises no abatement could be made, under 32 & 33 Vict. c. 14, s. 11, in respect of those parts which were occupied for the purposes of trade only. RUSBY *v.* NEWSON - - - - - 322

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LORD'S-DAY—*Profanation of the Lord's-day or Sunday*—21 *Geo.* 3, *c.* 49, *s.* 1—"*Place of Entertainment or Amusement.*"] The defendants, a company incorporated by an Act of Parliament, are the owners of the Brighton Aquarium, a building which consists of chambers below the level of the ground, and a terrace above. The chief part is used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. The whole is open to the public on Sunday on the payment of 6*d.* each person. An action having been brought against the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open a place of entertainment and amusement on the Lord's-day or Sunday:—*Held*, that the aquarium, under the above circumstances, was a place of entertainment and amusement within the statute. WARNER *v.* BRIGHTON AQUARIUM COMPANY - - - - 291

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NEGOTIABLE INSTRUMENT — *Foreign Scrip issued by Agent in England.*] Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment in full of the instalments due from him, to delivery by the agent of definitive bonds of the foreign government on their arrival in this country, and which by the usage of bankers and dealers in public securities, is transferred by mere delivery, passes by such delivery to a bonâ fide holder for value without title. Goodwin *v.* Roberts - - - - - 76, Ex. Ch. 337

—— Cheque—Pre-existing debt - Ex. Ch. 200
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PARTICULARS IN COUNTY COURT — *County Court Act*, 1867 (30 & 31 *Vict. c.* 142), *rr.* 174–180—*Interpleader—Particular of Goods claimed—Insufficient description.*] By rule 174 of the County Court Act, 1867, the claimant in an interpleader is required, five clear days before the day appointed for hearing the summons, to deliver to the bailiff or leave at the office of the registrar a particular of the goods alleged to be his property, and also the grounds of his claim.—Goods and money which had been seized under an execution upon a county court judgment were claimed by W., who delivered to the registrar a particular describing them as "the goods and money seized by virtue of the warrant." In the grounds of claim it was stated that the goods were the property of the claimant, and were at the time of the seizure in his possession. This particular was held insufficient by the judge, who refused to go further into the case, and made an order in favour of the execution creditors with costs.—Upon a rule calling upon the execution creditors and judge to shew cause why the judge should not hear and adjudicate upon the claim:—*Held*, by Kelly, C.B., and Amphlett, B., that the particular was sufficient; by Bramwell and Cleasby, BB., that it was insufficient. Richardson *v.* Wright. W. H Wright, Claimant - - - - 367

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PENALTY—Action—Venue - - Ex. Ch. 86
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PETTY BAG OFFICE—*Practice—Sealing Writ of Error in Misdemeanor*—12 & 13 *Vict. c.* 109, *s.* 38—*Fiat of Attorney General—Staying frivolous and vexatious Action.*] It is the duty of the clerk of the petty bag office in the Court of Chancery not to seal a writ of error in cases of misdemeanor until the Attorney General has issued his fiat.—The plaintiff having been convicted of a misdemeanor, prepared a writ of error, and requested the clerk of the petty bag office to seal it in pursuance of 12 & 13 Vict. c. 109, s. 38. The clerk having refused, on the ground that the Attorney General had not issued his fiat, the plaintiff brought an action against the clerk claiming

PETTY BAG OFFICE—*continued.*
damages for the refusal, and a mandamus to compel the clerk to seal the writ:—*Held*, that the action must be stayed, as being frivolous and vexatious, and an abuse of the process of the Court. Castro *v.* Murray - - - 213

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PROPERTY IN GOODS—*Contract of unascertained Goods—Passing of Property—Bills of Lading drawn up and indorsed by Shipper in Fraud of Consignee—Liability of Shipmaster—Charterparty providing that Master shall sign Bills of Lading as presented.*] The defendants bought from one M. all the ore of a certain mine in Spain, to be shipped by M. at Cartagena on ships to be chartered by the defendants or by him. The ore was to be paid for by bills against bills of lading, or by longer bills on the execution of a charterparty, and on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Several vessels had been loaded, and others chartered, and several payments made up to March, 1872, when the *T.*, one of the chartered ships, arrived at Cartagena. The payments which had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded, so that had M. shipped ore on the *T.* he would have been entitled to no payment in respect of it. He had ore which he could and ought to have shipped, taking bills of lading to the order of the defendants. Instead of doing this, before any ore was put on board the *T.*, he telegraphed to the defendants that he would not load the *T.* on their account, and though they telegraphed to him threatening him if he did not, he loaded the *T.*, taking bills of lading, making the shipment to be by one S., and the cargo deliverable to S.'s order. No certificate in relation to this ore was ever given to the defendants. By the terms of the charterparty the captain was to sign bills of lading as presented. S. was a fictitious person, and M., after indorsing the name of S. on the bills of lading and then his own, indorsed them for value to the plaintiffs:—*Held*, that the plaintiffs, as against the defendants, were entitled to the cargo. By Bramwell and Cleasby, BB., on the ground that though M. acted in breach of his agreement, yet the manner in which the ore was put on board the *T.*, and the form in

PROPERTY IN GOODS—*continued.*
which the bills of lading were taken, shewed that the property in the ore did not pass to the defendants before or after shipment; by Kelly, C.B., solely on the ground that the charterparty justified the master in signing bills of lading, which gave the plaintiffs a title.—In an action on a charterparty by Messrs. K., the former defendants, as charterers, against the shipowner for not delivering a cargo on board the *M.* to the plaintiffs according to the charterparty, it appeared that the charterparty of the *M.*, which was one of the vessels chartered for carrying ore under the contract above mentioned, did not authorize the master to sign bills of lading as presented, but the shipowner, by the charterparty, agreed to deliver the cargo to the plaintiffs. This cargo had also been fully drawn against, but M. obtained from the master bills of lading, as in the former case, and indorsed them for value to G., to whom the master delivered the cargo:—*Held*, by the majority of the Court (Bramwell and Cleasby, BB.), that the defendant was not liable, on the ground that the master performed his contract by delivering the cargo according to bills of lading. By Kelly, C.B., dissenting, that the defendant was liable, as the property in the ore drawn against had passed to the plaintiffs, the purchasers, and as the master was not justified under the charter in giving bills of lading which were inconsistent with the rights of the plaintiffs. Gabarron *v.* Kreeft. Kreeft *v.* Thompson - - 274

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REGULÆ GENERALIS, H. T. 1853, Rule 56 54
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RE-INSURANCE—*Marine Insurance—Policy—Interest.*] An underwriter "on goods" may reinsure by the same description; and the policy need not be expressed to be a re-insurance. Mackenzie *v.* Whitworth - - - 142

REMOTENESS OF DAMAGE—*Damages—Recovery of Costs of Litigation—Separate Contracts—Proximate Cause.*] H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by the defendants of the pictures over a part of the distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants, and requested them to defend it. The defendants refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The defendants paid the damages into court, and disputed their liability as to the costs:—*Held* (reversing the judgment of the Court below), that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs and the defendants having been separate and independent. *Mors Le Blanch* v. *Wilson* (Law Rep. 8 C. P. 227) (Lush, J., dissenting) disapproved. Baxendale *v.* London, Chatham, and Dover Railway Company - - - Ex. Ch. 35

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SPECIAL BAILIFF—*County Courts Acts* (9 & 10 *Vict. c.* 35), *ss.* 31, 33, 78, 94—(30 & 31 *Vict. c.* 142), *s.* 22—*Warrant of Distress against High Bailiff—Special Appointment by Registrar of Bailiff to execute Process—Power of Courts to execute Process.*] Where the judgment debtor under county court process is himself the high bailiff of the court, a special bailiff may be appointed to levy execution, and the warrant may be directed to him and others, although the Acts, 9 & 10 Vict. c. 95, and 30 & 31 Vict. c. 142, contain no express provision upon the subject.—The plaintiff was high bailiff of a county court, the defendant being one of the registrars of the court. An inquiry having been held under 9 & 10 Vict. c. 95. s. 116, which enables the judge to inquire in a summary way into any charge of extortion against a bailiff, and to make an order for the payment of such damages and costs as he shall think just, orders were made by the judge for the repayment by the plaintiff of fees overcharged by him, with costs to be taxed by the registrar. The costs were taxed by the defendant, without reference to the judge, and in the absence of the plaintiff. The plaintiff was served with orders to pay the overcharge, penalties, and taxed costs, but he objected to pay the costs. Application was then made to the defendant as registrar for warrants of execution against the plaintiff, and he issued warrants directed to "R. and others," and delivered to R. a written authority to act as assistant

SPECIAL BAILIFF—*continued.*
bailiff in the execution of the process, describing it as issued under 30 & 31 Vict. c. 142, s. 22, which directs that "every bailiff duly appointed by a high bailiff or a registrar may serve or execute any process which by any Act passed or to be passed is directed to be served or executed by a high bailiff, unless otherwise specially provided against therein." R. having seized the plaintiff's goods under the warrants, the plaintiff sued the defendant in trespass:—*Held*, first, that the warrants were not made illegal by what took place with reference to the costs, for s. 116 did not require the judge to settle the amount of the costs, and that at any rate the warrants themselves were based upon orders good on the face of them; secondly, that, though 30 & 31 Vict. c. 142, s. 22, was inapplicable, yet as the Act 9 & 10 Vict. c. 95, s. 78, after providing for rules and forms, concluded that in any case not expressly provided for, the general principles of practice in the superior courts of common law might be applied to proceedings in the county courts, it must be taken that the appointment of R. as special bailiff, was like the appointment of an elisor to execute process in the superior Courts, and it was also justified by the inherent power of all Courts, and the necessity of the case, and that the defendant was entitled to judgment. Bellamy *v.* Hoyle 220

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SUCCESSION DUTY—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 38—*Allowance for Loss of Annuity on Succession—Deprivation of Property on taking Succession.*] The tenant for life and his son the tenant in tail in remainder of real estates, by a disentailing deed in 1869, conveyed the estates to such uses as they should jointly appoint; and by a deed of even date in consideration of the son's intended marriage, appointed the estates to the use of trustees in fee from and after the marriage, subject to a proviso that if the father or son, or any person interested in the equity of redemption, should on a day named in 1874, pay to the trustees 20,000*l.*, with interest at 3*l.* per cent., the trustees should at any time on request reconvey the estates to the uses to which the equity of redemption should then stand settled; and the father convenanted that if the marriage was solemnized he would, so long during his life as the 20,000*l.* or any part should remain due to the trustees on the security of the deed, pay the trustees interest thereon at 3*l.* per cent.; provided that if he should pay the interest half yearly the trustees should not during his life call in the 20,000*l.* or any part; and the deed witnessed that the trustees should stand possessed of the 20,000*l*, upon the trusts declared by the marriage settlement of even date, viz. upon trust for the son for life with the usual trusts over for wife and children.—The marriage was solemnized, and the son received 600*l.* a year as entitled under the deeds until his father's death in 1874, when he became entitled in possession to the estates. In assessing the succession duty in respect of the estates under the Succession Duty Act, 1853, the son claimed an allowance in respect of the value of the annuity of 600*l.*, which he alleged he was "bound to relinquish" or was "deprived of" within s. 38:—*Held*, by the majority of the Court (Kelly, C.B., Bramwell, B.), that the case was concluded by *Lord Braybrooke* v. *Attorney General* (9 H. L. C. 150; 31 L. J. (Ex.) 177) and *Commissioners of Inland Revenue* v. *Harrison* (Law Rep. 7 H. L. 1), and that the allowance must be made.—By Cleasby, B., that those decisions were distinguishable, because the 600*l.* a year was payable, not during the joint lives of father and son, but during the father's life, and would have been payable to the son's

SUCCESSION DUTY—*continued.*
widow if he had died in his father's lifetime: that there was therefore no deprivation within s. 38, and that no allowance could be made. Le Marchant *v.* The Commissioners of Inland Revenue - - - - - - - 292

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TORTIOUS ACT OF SERVANT—*Master and Servant—Liability for Trespass—Chairman at Public Meeting—Order to remove Person making Disturbance.*] On the trial, in an action for assault, the plaintiff proved that he was present in the gallery of a large hall where there was a meeting convened by members of an association, and that the defendant acted as chairman. There was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance, but, according to his statement, he was seized by a man with a white ribbon in his coat and two policemen, and dragged over some benches to the front part of the gallery, and thereby injured. There was nothing to shew the position or duty of those who seized him, or whether any instructions as to keeping order had been given them by the defendant, before the act complained of:—*Held*, that there was no evidence to go to the jury of any liability on the part of the defendant, as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff; but only a particular direction as to a particular matter, and that the words used by the defendant did not authorize the officers to act upon their judgment as to who were the persons making the disturbance. Lucas *v.* Mason - - - - - - - 251

TREASURER TO GUARDIANS—*Banker and Customer*—15 & 16 *Vict. c.* 59, *s.* 19—*Forged Indorsement—Negligence in drawing Cheques.*] The defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the Orders were cashed like cheques payable to order. The defendant received no salary or remuneration, and the guardians received interest on their balance when it exceeded 3000*l.*—A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank.—On a case stated by an arbitrator in an action brought by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature:—*Held*, first, that the negligent drawing of the orders disentitled the plaintiffs to complain of the payment of the excess;—Secondly, that as to the payment on forged indorsements the account at the bank was in effect the plaintiffs' account; that the bank was protected by 16 & 17 Vict. c. 59, s. 19; and that as by the act and direction of the plaintiffs, the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and further, that if the account at the bank were regarded as the defendant's account, still being so kept by the order of the plaintiffs, they could not make any claim against him which he could not enforce against the bank. Guardians of Halifax Union *v.* Wheelwright - - - - 183

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